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In The Supreme Court of the United States

MICHAEL STRATECHUK,

Petitioner,

v.

BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as board president for the School District; and PETER P. HOROSHAK, in his official capacity as superintendent for the School District,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an issue of exceptional public importance and one of first impression in this Court. It is an Establishment Clause challenge to a government policy that disfavors religion by banning the performance of traditional Christmas holiday music in a New Jersey public school district *for no other reason* than that the music is associated with a religious holiday. Troubling is the fact that the challenged policy was enacted in 2004 to exclude Christmas music from being played at the traditional year-end concerts held in the school district for decades; concerts that are similar to those held—at least for the time being—in school districts all across this Nation.

Christmas is a national holiday, and religious music in the public schools is one of the rich traditions of this season. The Third Circuit's opinion, if left unchecked, will ensure the demise of this tradition, and it will embolden those who use the Establishment Clause as a blunt instrument against religion to continue to do so. Consequently, this case is about much more than holiday music. It is about halting the proliferation of government policies and practices that disfavor religion. A decision with such potentially broad and troubling implications merits review by this Court.

Unfortunately, this Court's flawed Establishment Clause jurisprudence has promoted—and in many respects, encouraged—such policy decisions. Indeed, the Third Circuit's opinion represents an entrenched double standard for such cases: a minimal standard of proof and a very low threshold for finding a

constitutional violation in cases alleging "approval" of religion, and a very high standard of proof and an almost impossible threshold to cross for finding a constitutional violation in cases alleging "disapproval" of religion. This case presents an opportunity for the Court to abandon its much maligned jurisprudence in favor of one that respects our Nation's religious heritage and traditions.

1. Whether a public school district policy that bans the performance of traditional Christmas music for no other reason than that the music is associated with a religious holiday violates the Establishment Clause.

2. Whether a double standard exists for Establishment Clause challenges to government policy decisions that disfavor religion, requiring this Court to resolve the conflict by clarifying its jurisprudence and setting forth the appropriate test for such cases.

PARTIES TO THE PROCEEDING

The Petitioner is Michael Stratechuk ("Petitioner").

The Respondents are Board of Education, South Orange-Maplewood School District ("School District"); Brian F. O'Leary, in his official capacity as board president for the School District; and Peter P. Horoshak, in his official capacity as superintendent for the School District ("Respondents").

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OPINION BELOW

The opinion, App. 1a, appears at 587 F.3d 597.

JURISDICTION

The opinion of the panel was issued on November 24, 2009. A petition for panel rehearing and a petition for rehearing en banc were denied on December 30, 2009. App. 78a-79a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

For decades prior to the 2004 *change* in school policy at issue here, the students in the School District performed holiday concerts that included music associated with religious holidays. These performances were consistent with and supported the educational goals of the music curriculum. App. 35a.

In 2003, for example, the School District held a holiday concert that included such notable religious holiday songs as "Joy to the World," "O'Come All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night." App. 6a. This concert was consistent with board policy in effect at the time (Policy 2270), and the

music selections *promoted and supported specific goals of the music curriculum*. This longstanding policy and practice, however, would end in 2004.

In October 2004, the School District issued a memorandum that dramatically changed the prior policy and practice of the School District with regard to religious music, specifically including the *performance* of such music in the district and elsewhere. This new policy had the *express purpose* of prohibiting and censoring student performances of classic Christmas songs such as "Joy to the World," "O'Come All Ye Faithful," "Hark, the Herald Angels Sing," and "Silent Night" at holiday concerts in the School District and elsewhere. The 2004 policy change effectively banned these songs from *any* performance.[1] App. 8a-9a, 38a.

In 2005, the policy was expanded to ban the performance of *all religious music* in the elementary grades (K-5). App. 12a.

By banning the *performance* of certain religious music, the policy not only fails to serve a legitimate curricular goal, but it also negatively impacts the

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[1] Mr. Nicholas Santoro, the supervisor of the Department of Fine Arts for the School District, testified as follows:

> Q: You haven't performed any of these carols that we've mentioned, O, Holy Night, Joy to the World, Silent Night, you haven't heard of these carols being performed during a non-holiday season; have you?
>
> A: During a non-holiday season, no.
>
> Q: There would be no reason to perform them during April or the summertime –
>
> A: No, it would not make sense.

music curriculum because the music teachers tend to teach what the students will perform. Thus, the policy effectively eliminates certain music from the curriculum simply because it is religious.

The School District and the panel mischaracterize the effect of the policy change (and the testimony of the music teachers with regard to this effect) in order to avoid the obvious: that the challenged policy is detrimental to a comprehensive music program and undermines sound educational goals and principles.[2] As Ms. Barbara Eames, a district music teacher, testified in her deposition, the ban on the performance of music is like telling the students: "You're going to become an artist, but you can't pick up a brush. You're going to become a singer, but you can't sing this song." As a direct consequence of the challenged policy, a significant aspect of learning music in the district is "removed totally from the children's experience."

A close inspection of the *text* of the challenged policy as reflected in the 2004 memorandum demonstrates that the School District's departure from neutrality is *not* merely subtle, which would suffice for invalidating the policy under the First Amendment, but positively blatant:

- The policy directs the music teachers to "*avoid any selection which is considered to represent any religious holiday*," naming specifically Christmas and

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[2] Mr. Bill Cook, a district music teacher, testified that the policy change "would obviously *cut out a body of music that I might have otherwise selected from* to - - for performance at concerts." (emphasis added). He also testified that that the policy was *not* beneficial for the students and their learning of music.

Hanukkah. (emphasis added). This restriction "holds true for any vocal or instrumental setting." So even *religious* holiday music *without* words is prohibited (apparently because the students and the audience will silently recall the words).

- The policy "eliminated" "traditional carols" (i.e., Christmas carols) from the "Brass Ensemble repertoire." As the undisputed evidence shows, this required the Brass Ensemble *to eliminate 90% of its repertoire*. *See* App. 43a.

- The policy bans the Martin Luther King (MLK) Gospel Choir from performing at the Columbia High School holiday assembly for the student body *because* the choral music it performs has religious content. Prior to the 2004 policy change, the MLK Gospel Choir was a standard performer at this event.

- The policy prohibits any "printed programs for any Holiday concert" to have any "graphics which refer to the holidays, such as Christmas trees and dreidels." App. 8a-9a.

In addition to this undisputed evidence, the panel never confronts nor materially refutes the voluminous evidence regarding the circumstances and social facts surrounding the enactment of the challenged policy. Instead, it dismisses the evidence and ignores its relevance, stating: "The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion." App. 23a. But this evidence has nothing to do with subjecting the issue to

a vote, as in the *Santa Fe* case that the panel cites.[3] App. 23a (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000)). Instead, it bears directly on the circumstances surrounding the adoption of this policy and the fact that it was reasonably likely to be perceived as disfavoring religion. To dismiss the reaction of the community, teachers, parents, and students to this inane policy as if their reaction had no relevance is contrary to controlling law.[4]

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[3] It should go without saying that the government can violate the constitutional rights of the majority as well as the minority—there is no "affirmative action" program under the Establishment Clause.

[4] The panel's approach was flatly rejected by this Court in *Santa Fe*:

> The [school district], nevertheless, *asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly*—that this policy is about prayer. The [school district] further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. *We refuse to turn a blind eye to the context in which this policy arose*, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer. . . . Therefore, the *simple enactment* of this policy, with the *purpose and perception* of school endorsement of student prayer, was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury.

Santa Fe Indep. Sch. Dist., 530 U.S. at 315-16 (emphasis added).

Unlike this Court in *Santa Fe*, the panel failed to recognize what every student, teacher, parent, and member of the South Orange/Maplewood community understands: the School District's policy targets certain music for disfavored treatment *because it is associated with a religious holiday*, thereby conveying a message

The illicit purpose and effect of the School District's ban on religious music was not lost on the community. The response to this new policy was widespread and vocal opposition. For example, parents circulated a "Petition Asking the Board of Education to Honor Religious Tolerance." The petition stated:

> *We, the undersigned, believe the Maplewood / South Orange Board of Education should practice religious tolerance in our schools, and reverse the recently established ban on the performance of religious music, the ban on holiday parties, and the ban on holiday concerts.*

See App. 43a.

Numerous members of the community spoke out against this policy at school board meetings, calling for its reversal. The School District received a flood of e-mails and letters complaining about the policy and its hostility toward religion. For example, a letter from Mark and Deborah Jacoby, who claim to "have attended instrumental and choral performances in both [Maplewood Middle School] and at [Columbia High School] for the past 8 years," insightfully notes: "Since instrumental music cannot inhibit or advance any religious point of view, it is difficult to imagine under what circumstances religious music *would* be permitted. This is not an interpretation of the Board's stated policy, *it is an outright reversal of that policy*."

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of disfavor of religion in violation of the Establishment Clause. There are *no* religiously-neutral criteria for the challenged policy's prohibitions—and the School District can point to none.

(emphasis added). Editorials and other news stories were written conveying similar sentiments. *See* App. 42a-43a.

Opponents of the new policy went so far as "organizing an 'illegal' night of Christmas Carols, Hanukah songs and other musical pieces banned by the South Orange/Maplewood Board of Education." This organized assembly occurred on December 21, 2004, and its sponsors "urged people of *all faiths* to join" as a protest to the new policy banning religious music. App. 44a.

Other protests, unrelated to the December 21, 2004, assembly, occurred on November 19, 2004, and again on November 22, 2004. During these events, a protestor played Christmas carols on a "boom box" in front of the Marshall School and the Columbia High School respectively.

District-sanctioned parent associations, such as the Columbia High School Music Parent's Association, demanded that the school board revisit its "drastic reinterpretation" of its policy, noting, *inter alia*, that "[r]*eligious* music is an important component in studying music education as much of the body of music today was inspired by, or commissioned for *religious* purposes." (emphasis added). The Maplewood Middle School HSA, a district-sanctioned organization, voiced similar opposition to the recent policy change. App. 43a.

Not only the community at large, but also the School District *music faculty*, expressed opposition to the new ban on religious music. In a November 23, 2004, letter from the teachers to the superintendent

and the Board of Education, the teachers stated: "The music teachers of the district would like to express their *extreme concern* and their *intense opposition* to *the change in the interpretation of the district's holiday music policy*, as was stated in a memo we received from Mr. Nicholas Santoro dated October 29, 2004. As we understand it, student vocal and instrumental groups *may not perform any religious music* at December concerts or at events outside of school." (emphasis added).

The music teachers continue:

> The attempt to purge the district's "holiday" programs of holiday music amounts to no less than censorship of both sacred musical masterpieces and non-sacred musical and cultural traditions . . . .
>
> *This policy is dangerous to the ideals of religious tolerance upon which this county* (sic) *was founded*, and *it tears at the fabric of American culture* that makes us different from the rest of the world. . . .
>
> As music teachers, we believe that the *religious* music that our choral and instrumental groups have performed in the past is an important part of our music curriculum and the national standards for music. . . .
>
> We would respectfully suggest that this policy re-interpretation creates more problems than it solves. Most importantly, the performance of *religious* music teaches children tolerance and

> the acceptance of others with different beliefs and heritages.

See App. 43a (emphasis added).

In closing, the music teachers urged the Board to "*re-instate the performance of holiday music*," which the School District has not done.

In addition to this collective response, individual teacher responses to the censorship of their music programs further demonstrate the illicit purpose and effect of the district's new policy banning the performance of religious music.

For example, Mr. Bill Cook, a district music teacher, responds on November 16, 2004, to Mr. Santoro's request to review his music program as follows:

> Nick:
> For the Holi . . . uh, Ram . . . uh, Chri . . . uh, December concert the 7th and 8th grade Orchestras at SOMS and MMS will be performing the following:
>
> The Star Spangled Banner by Key
> The Great Gate of Kiev by Mussorgsky
> Hava Nagila – traditional
> Concerto in D by JS Bach
> Winter Wonderland (maybe) by Smith and Bernard
>
> *I will try to keep all references to the birth of You Know Who, the 8 days of You Know What and the R month to a minimum.*

Thank you for your consideration.
God Bless,
Cook.

App. 41a-42a.

Mr. Vern "Bass" Miller had a similar response to Mr. Santoro:

Hi Nick,
Both Middle School Bands and Orchestras will be joyantly (sic) performing the following pieces:

1. Oh, Holy Night
2. Angels We Have Heard On High
3. We Three Kings

We will be joined by the school choruses singing these selections while we play.
Additionally, all performances will begin with a prayer and reading from the Holy scriptures (sic).
THOUGHT YOU MIGHT APPRECIATE OUR EFFORTS TO COMPLY WITH THE BOARD'S HOLIDAY MUSIC POLICY!!!
In truth,
MMS Concert: Monday, Dec 12th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody
Sing, Sing, Sing
SOMS Concert: Tuesday, Dec 13th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody
Peace,
Vern

App. 45a-46a.

Mr. John DeVita responds to Mr. Santoro's request by informing him that "the Gospel Choir proposes to sing the first verse of 'Lift Every Voice and Sing' in honor of Quanza (a *non religious* holiday)" and stating, "I trust that this will conform to the existing board policy."[5] App. 42a.

As the evidence shows, there is *no* valid, secular, educational purpose for banning the performance of Christmas music during Christmas, a national holiday. According to the National Association for Music Education, "[T]he study and performance of religious music within an educational context *is a vital and appropriate part of a comprehensive music education*. The omission of sacred music from the school curriculum would result in an incomplete educational experience."

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION CONFLICTS WITH DECISIONS FROM THIS COURT AND OTHER CIRCUIT COURTS.

The panel's decision is contrary to the decisions of this Court in that it conflicts with the controlling principles of law set forth in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and

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[5] The fact that "Kwanza" music was considered permissible further demonstrates that the purpose of this policy was to ban religious music—particularly Christmas music—and not simply "cultural" or "holiday" music.

Epperson v. Arkansas, 393 U.S. 97 (1968), among others, as argued more fully below.

The decision is also contrary to decisions from other circuit courts, which make plain that the performance of traditional Christmas music in the public schools is not prohibited by the Constitution. Rather, to ban such music because it is religious conveys a message of hostility and not one of neutrality as required by the Establishment Clause. *See Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("*A position of neutrality towards religion* must allow choir directors to recognize the fact that most choral music is religious. Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311, 1317 n.5 (8th Cir. 1980) (upholding against an Establishment Clause challenge the study and performance of religious songs in the public schools, including the singing of traditional Christmas carols); *Bauchman v. West High Sch.*, 132 F.3d 542, 554-56 (10th Cir. 1997) (selecting Christian religious music and Christian religious sites for performance by school choir did not violate the Establishment Clause and noting that "it is recognized that a significant percentage of serious choral music is based on religious themes or text").

II. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE POLICY DECISIONS THAT DISFAVOR RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and that we guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (internal citation omitted). One such way in which these "values" are eroded is by the passage of a government policy that singles out religious music for disfavored treatment because it is associated with a religious holiday. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern day Establishment Clause jurisprudence has led the law to disfavor religion, thereby promoting such policy decisions. Consequently, a substantial revision of this Court's jurisprudence is in order.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have

> observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added).

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), the Court acknowledged the following: "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or *of religion in general*." (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is not hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious—particularly those that are part of our national traditions. This case is just such an example.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national tradition" has

come to fruition. It is time to reverse this harmful and divisive trend.

III. THE PANEL'S DECISION EVISCERATES CLAIMS CHALLENGING GOVERNMENT POLICIES THAT DISFAVOR RELIGION.

By dismissing Petitioner's evidence of an illicit purpose and effect and crediting Respondents' contrary, self-serving assertion that they were simply seeking to avert an Establishment Clause violation, the panel's decision creates a bright line rule that essentially undermines all claims advanced under a "disapproval" of religion theory. Permitting the panel's decision to stand would pave the road for removing all religious references from official recognition simply because they represent religion. The pernicious effect of the panel's decision is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

In this case, by banning a longstanding and permissible practice—the performance of Christmas songs during the holiday season—for no other reason than that the music is associated with a religious holiday, Respondents have conveyed an impermissible message of disapproval of religion.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989), but also

actions that tend to "disapprove of," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Lynch*, 465 U.S. at 673 ("hostility"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"). Our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (emphasis added); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of religion, as evidenced by Respondents' policy, sends a message to Petitioner and other Christians that their religion is disfavored in the community. *See County of Allegheny*, 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily upon the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.*

Id. at 704 (emphasis added).

While the language from these cases appears to support a "disapproval of religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate. *See Borden v. School Dist. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (upholding a prohibition on a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (upholding a school district's refusal to allow a parent to read Bible verses to her son's kindergarten class during the student's "All About Me" week); *American Family Ass'n v. City & County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as

much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge); *cf. Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), *cert. denied*, 559 U.S. __ (2010) (upholding a ban on the student performance of "Ave Maria" at a public school graduation).[6] At a minimum, there is much confusion in the lower federal courts that only this Court can clarify.

Unfortunately, in the Third Circuit, and elsewhere, even the most subtle and inconsequential act *favorable* to religion is quickly held impermissible, *see, e.g.*, *Borden v. School Dist. of East Brunswick*, 523 F.3d 153 (3d Cir. 2008) (prohibiting a football coach's participation in *student-led* prayer by silently bowing his head during grace and taking a knee during locker room prayer); *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009) (refusing to allow a parent

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[6] *Compare Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (acknowledging that removing Christian symbols, such as a cross, from all public displays "evinces not neutrality, but instead hostility, to religion" and holding that the inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) ("Limiting the number of times a religious piece of music can be sung is tantamount to censorship and *does not send students a message of neutrality*. . . . Such animosity towards religion is *not required or condoned by the Constitution*.") (emphasis added); *ACLU v. Mercer County*, 432 F.3d 624, 638-39 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome").

to read Bible verses to her son's kindergarten class during the student's "All About Me" week), making hostility to religion the standard to comport with the Establishment Clause, as this case further demonstrates. This view of the Court's jurisprudence inevitably leads to a view of the law that is disapproving of religion.

An official policy that makes exclusions based on religious criteria is not *neutral* toward religion, but rather hostile to it. And even *subtle departures from neutrality* are prohibited under this Court's prior decisions. *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 534; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (admonishing the courts to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded" and to "guard against other different, yet equally important, constitutional injuries"); *see also School Dist. of Abington Township*, 374 U.S. at 306 (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "hostility to the religious"). But these principles are often cast aside in favor of an approach that employs curettage and disinfectant for all that partakes of the religious in public life.

In the present case, even apart from the overwhelming contextual evidence, the literal text of the challenged policy as reflected in the October 2004, memorandum violates the Establishment Clause *on its face* because it expressly mandates disfavor toward religion by officially censoring certain music *because of its religious content* and for no other reason. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 314 (holding that "the *mere passage* by the District of a policy" that has the

"purpose and perception" of favoring religion violates the Constitution) (emphasis added).

An examination of the *entire* record further demonstrates that the School District's departure from neutrality was anything but "subtle"; it created the very kind of political divisiveness along religious lines that the Establishment Clause was designed to avoid. The panel's description of the challenged policy as one that promoted "complete religious neutrality," App. 3a, is belied by the undisputed evidence, specifically including the immediate and overwhelming public and faculty outrage over the policy precisely because it disfavored religion. If the School District had chosen to use genuinely *neutral* educational criteria for its policy toward the performance of music, it would have continued teaching its decades-old music curriculum and performing religious music selections found in its standard music texts, and there would be no constitutional problem. But, instead, it chose to use *religious* criteria to censor the music curriculum—literally combing that curriculum and banning the performance of music the censors deemed religious. Thus, it is implausible to argue, as the panel does, that the School District's policy promotes "complete religious *neutrality*."

Also troubling is the panel's reliance on Amici's argument that "Establishment Clause jurisprudence recognizes that neutrality towards religion is quite distinct from hostility towards it." App. 22a. This is troubling because the Third Circuit does not extend this same argument to cases that allege official *approval* of religion. When such approval—no matter how slight—is alleged, there is invariably a hair-trigger finding that the Establishment Clause has

been violated. *See, e.g., Borden*, 523 F.3d at 153; *Busch*, 567 F.3d at 89. But where official *disapproval* of religion is alleged—no matter how blatant—there is invariably a finding that this disapproval is mere "neutrality." The resulting one-sided view of the Establishment Clause in itself disfavors religion.

The panel further quotes and assents to Amici's erroneous view that "[w]ere that not the case, almost every government action vis-à-vis religion would fall into one of two columns—pro- or anti-religious, promoting or hostile to—and be subject to Establishment Clause attack in either event." App. 23a. This case demonstrates the falsity of this claim because there is a third position, which is *true* neutrality toward religion. Unfortunately, Amici's argument does apply in the Third Circuit and elsewhere to cases that are considered "pro-" religion, resulting in a reflexive finding of a constitutional violation. In contrast, cases challenging policies that disfavor religion are simply dismissed as a lawful means of promoting neutrality, albeit a false neutrality. Thus, in the Third Circuit as well as others, "neutrality" does equate to hostility.

In sum, there is no dispute that the challenged policy targets for *disfavored* treatment certain music *only* because it is associated with a *religious* holiday. The performance of music associated with secular holidays, such as Kwanza, is permitted, but music associated with the Christian holiday of Christmas is banned *for no other reason* than that it is a *religious* holiday. Such a policy can hardly be considered neutral toward religion. And, as the record amply reveals, this was not a benign policy; it created

tremendous divisiveness in the community along religious lines.

As noted previously, the panel's decision represents an entrenched and improper double standard for Establishment Clause cases that requires only a minimal standard of proof for finding a constitutional violation in "approval" cases and a very high standard of proof for finding a constitutional violation in "disapproval" cases. This case presents a perfect opportunity to eliminate this double standard in the lower federal courts by applying the Establishment Clause in an evenhanded manner, as required by this Court's precedent.

In the final analysis, the panel's decision eviscerates all case law prohibiting government disapproval of religion. However, the lack of clarity from this Court, particularly with regard to "disapproval" claims, is a major contributing factor for the inconsistent opinions below.

IV. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO INCONSISTENT RESULTS THAT PROMOTE HOSTILITY TOWARD RELIGION.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1

(2004) (Thomas, J., concurring in the judgment) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

Inconsistent results—results which tend to disfavor religion—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *ACLU v. Schundler*, 168 F.3d 92, 113 (3d Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has

secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence.").

This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing *for the first time* a case involving disfavor of religion. Petitioner suggests that (a) in cases of government *accommodation* of historic or traditional practices involving religion, such as the performance of Christmas music during the holiday season, this Court should adopt a rational basis standard of review; and (b) in cases of government disfavor of or hostility toward religion, such as Respondents' policy decision to ban the performance of traditional Christmas music in their school district simply because it is music associated with a religious holiday, a strict scrutiny standard should apply. Such an approach is consistent with our history and traditions, *see, e.g.*, *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general."), and it provides a well-established analytical framework within which to evaluate Establishment Clause claims. This framework would provide needed guidance for the lower courts and would stem the tide of cases and opinions disfavoring religion.

A. THE ESTABLISHMENT CLAUSE PERMITS ACKNOWLEDGMENT OF RELIGION, BUT FORBIDS HOSTILITY TOWARD ANY.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Van Orden*, 545 U.S. at 686 (quoting *Lynch*, 465 U.S. at 674). Examples of this historical acknowledgment include Executive Orders recognizing religiously grounded national holidays, such as Christmas and Thanksgiving, Congress directing the President to proclaim a National Day of Prayer each year, the printing on our currency of the national motto, "In God We Trust," the display of the crèche during Christmas, *see Lynch*, 465 U.S. at 675-77, 686, and representations of the Ten Commandments on government property. *Van Orden*, 545 U.S. at 677; *see also Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws).

In *Lynch*, the Court concluded its recitation of examples of government recognition of religion by stating,

> One cannot look at even this brief resume [of historical examples] without finding that our history is pervaded by expressions of religious beliefs. . . . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice

> Douglas observed, governmental action has "[followed] the best of our traditions" and "[respected] the religious nature of our people." [*Zorach*, 343 U.S. at 314].

465 U.S. at 677-78.

As this Court observed: "Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that religion has been closely identified with our history and government, and that the history of man is inseparable from the history of religion." *Van Orden*, 545 U.S. at 687 (internal quotations and citations omitted); *see also Elk Grove Unified Sch. Dist.*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); *id.* at 35-36 (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

The performance of Christmas music in the public schools has long been a part of our national traditions and remains so today. *Cf. Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America."). Governmental suppression of this tradition is the antithesis of the value of religious tolerance that underlies the Establishment Clause.

See, e.g., Lamb's Chapel, 508 U.S. at 400 (Scalia, J., concurring in the judgment). This case is illustrative.

Thus, while the performance of Christmas music in our public schools is a permissible way to acknowledge that we are a religious people with a long and rich religious heritage, policy decisions that disfavor religion do not enjoy such a favorable history and should, therefore, be treated differently under the law. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "forbids hostility toward any" religion) (internal punctuation, quotations, and citations omitted); *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Constitution "forbids an official purpose to disapprove of a particular religion or of religion in general").

Consequently, this Court should adopt a rational basis standard of review for longstanding religious practices and traditions, such as the performance of traditional Christmas music in public schools. This standard would be consistent with the history and traditions of our Nation and the framework of the First Amendment, and it would provide a well-established test for the lower courts to apply. Moreover, it would remove from the calculus the "complying with the Establishment Clause" claim so often invoked as justification for the government's hostility toward religion. *See Widmar v. Vincent*, 454 U.S. 263, 270-71 (1981) (holding that the state's interest in complying with the Establishment Clause did not justify discrimination against a religious group).

On the other hand, government action that is hostile toward religion, such as the policy decision presently before this Court, does not share the same

history and tradition and should therefore be treated under a higher standard of review.

B. THIS COURT SHOULD ADOPT A STRICT SCRUTINY STANDARD OF REVIEW FOR GOVERNMENT ACTIONS THAT DISFAVOR RELIGION UNDER THE ESTABLISHMENT CLAUSE.

Because the Constitution *forbids* hostility toward a particular religion or of religion in general, such practices should be judged under the Establishment Clause by applying a strict scrutiny standard of review. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 520 (applying strict scrutiny to strike down law under the Free Exercise Clause that targeted a particular religion). Thus, a government action that disfavors religion, such as the policy decision at issue here, should be held "invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533. Here, there is no compelling interest—or indeed even a rational basis—to justify banning the religious music.

In the final analysis, Respondents seek to mask their religiously hostile policy decision to ban the performance of traditional Christmas music by hiding behind the muddled Establishment Clause jurisprudence of this Court. Respondents should not be allowed to do so.

CONCLUSION

While it is evident that the panel's decision conflicts with several decisions from this Court and other circuit courts so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3826

[Filed November 24, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-04-cv-06189)
District Judge: Honorable William H. Walls

Argued September 14, 2009

Before: SLOVITER, FUENTES, and
SMITH, Circuit Judges.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue before us is whether a School District, in order to maintain a policy of complete religious neutrality, may prohibit celebratory religious music at school-sponsored events. The District Court, in a careful analysis of the facts on record and the applicable law, upheld the School District's discretion to maintain and enforce its policy. *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 577 F. Supp. 2d 731 (D.N.J. 2008).

The unsuccessful plaintiff, Michael Stratechuk, the father of two students in the School District of South Orange-Maplewood, New Jersey ("School District"), appeals the District Court's grant of summary judgment in favor of the School District (and related defendants) on Stratechuk's claims filed pursuant to 42 U.S.C. § 1983, that the School District's policy on the performance of religious holiday music violates the Establishment Clause and his children's First Amendment "right to receive information and ideas, right to learn, and right to academic freedom." *Id.* at 749.

I.

Factual and Procedural Background

Policy 2270, "Religion in the Schools" ("Policy 2270"), was adopted on April 2, 2001, by the South

Orange-Maplewood Board of Education. It provided that:

> It is the goal of the [School District] to foster mutual understanding and respect for the right of all individuals regarding their beliefs, values and customs. In pursuing this goal, we recognize that we serve a diverse community with varying cultural, ethnic and religious orientation.
>
> We are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools.
>
> Music, art, literature, dance and drama along with religious customs and traditions, which have come to us from various elements of our national population, may be used to broaden our pupils' awareness of the many elements that comprise our diverse American culture.
>
> In any reference to religion in the schools, the district is guided by the following concepts when determining the appropriateness of activities: (1) the activity should have a secular purpose, (2) the activity should neither advance nor inhibit religion, and (3) the activity should have relevance to the curriculum.

App. at 365.

On the issue of the "Treatment of Religion in the Curriculum," Policy 2270 permitted the "inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view." App. at 365. It also permitted student-initiated expression of "religious belief or non-belief in compositions, works of art, music, speech and debate." App. at 365. Policy 2270 permitted the use of religious symbols only "to teach about historical or cultural context, not to promote or celebrate religious concepts, events or holidays." App. at 365.

As most relevant to this appeal, the section," Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts," provided:

> 1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However, opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.
> 2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.
> 3. Decorations with religious significance are not permitted.

> 4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.
>
> a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.

App. at 366.

Prior to the 2004-2005 academic year, holiday music (Christmas and Hanukkah songs) were performed at the School District's December concerts. In the Fall of 2003, the mother of a School District student told her child's music teacher, William Cook, that she objected to her daughter playing the "Christmas Sing Along" at the December concert. App. at 77. Cook recounted this concern to Nicholas Santoro, the Director of Fine Arts, who passed the concerns on to James Memoli, the Assistant Superintendent.

In any event, the music repertoire of the December 2003 concert included "Star Spangled Banner," "Sounds of Hanukkah (a medley of 3 Hanukkah tunes)," "*Recuerdos de la Alhambra*," and the "Christmas Sing Along" which was a medley of "Joy to the World," "Silent Night," "Oh, Come All Ye Faithful," and "Hark the Herald Angels Sing."

After that concert, the objecting mother sent a letter to Peter Horoschak, the Superintendent of the School District, "express[ing her] concern that the School Board policy was not followed" because "point 4(a) [of Policy 2270] clearly states 'Music programs prepared or presented . . . shall not have a religious

orientation or focus on religious holidays.'" App. at 181. The letter continued, "[a]s you know, the selection of music, both instrumental and vocal, had a clear religious orientation and focused on religious holidays." App. at 181-82. Horoschak responded, "[i]t was our judgment that because of the variety of both secular and 'holiday' (i.e., Hanukkah and Christmas) selections . . . there was not one particular focus on a particular religion or religious group, and, as such, there was no attempt to advance any religious point of view." App. at 183. However, he also noted that "concerns raised by parents regarding the holiday concert at South Orange Middle School suggest that the policy needs further clarification,"[1] and that Memoli and Santoro "are engaged in on-going discussions about such musical programs, and they will recommend to me suggested language for regulations which should clarify what types of programs and activities are permissible and not permissible under this policy." App. at 183.

On March 24, 2004, the School Board addressed the December concert issue at Horoschak's annual performance review, and, according to Horoschak's deposition testimony, the "board members had heard from some community members about instrumental music that . . . people felt represented a celebration of Christmas holidays and also there ha[d] been

---

[1] The District Court noted that Horoschak "had a general recollection of parents' [sic] expressing similar concerns [about] the December concerts during the time period between 1998 and 2003, although he could not remember any specific instance other than one where a Muslim parent raised concerns that his/her faith was not represented during the concert." *Stratechuk*, 577 F. Supp. 2d at 734-35 n.1.

discussion about the fact that you really can't balance all religious groups in these representations in these types of performances." App. at 166. The Board decided "that [Policy 2270] would be consistently implemented . . . [so] that there wouldn't be so much discretion . . . by every faculty member," and discussed drafting regulations to clarify the policy. *Stratechuk*, 577 F. Supp. 2d at 735.

After meeting with relevant faculty and staff, Santoro issued a memo to the Department of Fine Arts, dated October 29, 2004 ("October 2004 Memo"). It stated that the "board policy, as it is written, will be implemented," and included the following bullet points:

> [1.] All programs will be reviewed and approved by me.
>
> . . .
>
> [2.] We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.
>
> [3.] I would strongly suggest you gear towards the seasonal selections – Winter Wonderland, Frosty The Snowman, etc. Music centered on Peace is also a nice touch.
>
> [4.] For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.
>
> [5.] The MKL [sic] Gospel Choir cannot perform at the CHS Holiday Assembly for the student body.

> [6.] Your printed programs for any Holiday concert must avoid graphics which refer to the holidays, such as Christmas Trees and dreidels.

App. at 249.

In response to the October 2004 Memo, there were complaints from, inter alia, music teachers, parents, the South Orange Village President, and representatives of the MLK Gospel Choir. For example, seventeen members of the Maplewood community signed a "Petition Asking the Board of Education to Honor Religious Tolerance." App. at 250. Other complaints were more vigorous.

However, as Cook explained in his deposition testimony, Policy 2270 "didn't prohibit all religious music" in performances, only "music based on . . . or themes consistent with pieces commonly associated with the holiday at the time of the holiday." App. at 92. Accordingly, Santoro approved the performance of Vivaldi's *Gloria in Excelsio* (*Cum sancto spiritu*) because "[t]he program does not have a religious orientation and it does not refer to a holiday. . . ." App. at 370.

In addition, Policy 2270 and the October 2004 Memo were interpreted to prohibit only the performance of celebratory holiday music – not the teaching of such music in particular or of religious music in general. For example, Santoro testified that "[i]n performance [of the winter] concerts those selections [i.e., Joy to the World, Oh, Come All Ye Faithful, Hark, the Herald Angels Sing, and Silent Night] would not be allowed," although "[i]n the

curriculum they would be allowed to be taught." App. at 133. He amplified that point in a letter to music teacher Barbara Eames stating that she could continue to "teach about the different holidays in . . . music classes" because "[c]lassroom work is not a 'program,'" within the meaning of Policy 2270. App. at 369. Although Eames contended in a declaration to the District Court that the October 2004 Memo "has caused me to exclude certain music pieces that I would have used to achieve specific goals of the music curriculum" and "has caused me to censor my music curriculum . . . in a way that I believe is harmful to [my students'] education and contrary to the goals of the music curriculum," App. at 391, she conceded in her deposition testimony that "I haven't removed [Christmas or Chanukah songs] from my classroom curriculum because the policy does not do that," App. at 310.

The music performed at the 2004 December concert (approved by Santoro) included "Jingle Bell Rock," Vivaldi's "Gloria," "Winter Wonderland," "*Hava Nagila*," "Madrigal of the Bells," "Rudolph the Red-Nosed Reindeer," and "Frosty the Snowman." Since 2004, songs with religious content have been performed at the December concerts; the 2005 concerts included "*Concerto VIII Fatto per la notte di natale*," "Waters of Babylon (psalm 137)," "*Jubilate*," and "*Agnus Dei / Cum Sanctis*."

On December 17, 2004, Stratechuk filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey (and later an amended complaint) naming as defendants the School District, its Board of Education, the Board President and Superintendent Peter P. Horoschak

(together, "School District").[2] The Complaint alleged that during "the 2004/2005 school year . . . Defendants created, adopted, and implemented a strict policy of banning all religious music, including instrumentals, from the public schools in the district," such that "students . . . are no longer permitted to learn about, listen to, and participate in the presentation of traditional Christmas music during such curricular and co-curricular events as year-end holiday concerts, assemblies, and recitals." Complaint at ¶ 15. Stratechuk alleged that the School District's actions violated his and his minor children's rights under the Establishment Clause of the First Amendment by "convey[ing] the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity. . . ." Complaint at ¶ 21. In addition, Stratechuk claimed that the same actions deprived him "and his minor children of their right to receive information and ideas, their right to learn, and their right to academic freedom, which are guaranteed under the First Amendment. . . ." Amended Complaint at ¶ 24. Stratechuk sought (1) a declaratory judgment that his and his children's constitutional rights had been violated, (2) "a permanent injunction enjoining Defendants' policy, practice, and/or custom of banning religious music within the School District," (3) "damages for the past loss of his and his minor children's constitutional rights," and (4) attorneys' fees, costs and expenses. Amended Complaint at 7.

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[2] In addition to stating that Stratechuk was the father of two minor children enrolled in the School District, the Complaint also noted that he was a music teacher at Hunter College in Manhattan, a professional violinist and conductor, and a Christian. Complaint ¶¶ 8-9.

On October 10, 2005, *after* the period at issue in Stratechuk's complaint, the School District amended Policy 2270 by removing Section 4(a). *See* p. 4-5 *supra*. At the same time, in order to clarify Policy 2270 the School District adopted regulation R-2270, "Religion in the Schools," App. at 385, which provides that for children in grades 6-12, the "performance of music with religious text is appropriate when doing so is an outgrowth of the curriculum," but "musical performances shall not be celebrations of particular religious, ethnic or cultural holidays," App. at 386. For elementary school students, the performance of "music with a religious text shall be avoided." App. at 386. In addition, the section entitled "Celebration of Religious Holidays Prohibited" states that "[m]usical concerts or assemblies which take place during holiday seasons will not be 'holiday concerts,' which celebrate religious, cultural or ethnic holidays." App. at 387. Stratechuk has not amended his complaint to include a challenge to this regulation or any of the School District's specific actions that occurred after he filed his amended complaint. The District Court, Appellees, and Amici correctly note that the schools have permitted the performance of music with religious content since 2004. *See Stratechuk*, 577 F. Supp. 2d at 738; Appellee's Br. at 11-12; Amici's Br. at 10-11.

The District Court dismissed Stratechuk's complaint, finding that his claim relied on Policy 2270 alone and that he could not state a claim under that policy. *See Stratechuk v. Bd. of Educ. of S. Orange-Maplewood Sch. Dist.*, 200 F. App'x 91, 93-94 (3d Cir. 2006). This court vacated and remanded in a non-precedential opinion, noting that the "policy that Stratechuk alleges was in place in 2004-2005 is decidedly different than the 'official policy'" articulated

in the text of Policy 2270 and concluding that "a categorical ban on exclusively religious music," of the type that Stratechuk alleges, "appears to state a claim under the First Amendment." *Id.* at 94.

On remand, the parties engaged in discovery and both moved for summary judgment. The District Court granted summary judgment in favor of the School District, holding that Policy 2270, as interpreted by the October 2004 Memo (and as applied) did not violate the Establishment Clause or any First Amendment "right to receive information, ideas, right to learn, and right to academic freedom." *Stratechuk*, 577 F. Supp. 2d at 749. Stratechuk timely appealed.

II.

Jurisdiction and Standard of Review

The District Court had jurisdiction over Stratechuk's § 1983 claim under 28 U.S.C. §§ 1331 and 1343(a)(3), and this court has jurisdiction under 28 U.S.C. § 1291.

This court "review[s] a grant or denial of summary judgment de novo, applying the same standard as the District Court." *Pichler v. UNITE*, 542 F.3d 380, 385 (3d Cir. 2008). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In making this determination, we 'must view the facts in the light most favorable to the nonmoving party and draw all inferences in that

party's favor.'" *Norfolk S. Ry. v. Basell USA, Inc.*, 512 F.3d 86, 91 (3d Cir. 2008) (quoting *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir. 2001)).

III.

Discussion

A. The Establishment Clause

Stratechuk launched a broad First Amendment attack against the School District's interpretation of Policy 2270, focusing in the first instance on the Establishment Clause. Under the Establishment Clause of the First Amendment,[3] "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. The Supreme Court has read this clause to forbid not only "law respecting an establishment of a religion," U.S. CONST. amend. I, but also "an official purpose to disapprove of a particular religion or of religion in general," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). "The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

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[3] The Establishment Clause of the First Amendment, "of course, has long been held applicable to the States." *Wallace v. Jaffree*, 472 U.S. 38, 42 n.10 (1985).

Under the so-called *Lemon* test, a state law or governmental action violates the Establishment Clause if (1) it lacks a secular purpose, (2) "its principal or primary effect . . . advances []or inhibits religion," or (3) it "foster[s] an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citation and quotation omitted). Although still good law, *see McCreary County*, 545 U.S. at 859-61, some Justices have criticized the *Lemon* test, *see, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ."). Without discarding the *Lemon* test, the Court has set forth two related tests, the "coercion test," *see Lee v. Weisman*, 505 U.S. 577 (1992), and the "endorsement test," *see Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring). The District Court analyzed Stratechuk's claim under *Lemon*, concluding that the *Lemon* test was the most appropriate for the claim before it. Stratechuk argues that the School District's policy and conduct violates the Establishment Clause under both the *Lemon* test and the endorsement test.

1. The *Lemon* Test

"In applying the purpose [prong of the *Lemon*] test, it is appropriate to ask whether government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (internal quotation omitted). "While [a court] is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). As such, "[t]he eyes that look to purpose belong to an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *McCreary County*, 545 U.S. at 862 (internal quotations omitted).

Here, there is no religious purpose – only a secular one – so the issue is whether this secular purpose is actually, as Stratechuk maintains, a purpose to disapprove of religion. The School District argues, and the District Court found, that the purpose of the policy was to avoid government endorsement of religious holidays and a potential Establishment Clause violation. Although there are few opinions addressing this type of secular purpose, the District Court cited several courts of appeals' opinions where the courts held that "[a]ctions taken to avoid potential Establishment Clause violations have a secular purpose under the purpose prong of the *Lemon* test." *Stratechuk*, 577 F. Supp. 2d at 743 (citing *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255 (9th Cir. 2007) (holding that county's removal of the image of the cross from its official seal in order "to avoid a potential Establishment Clause violation [had a] valid

secular purpose under *Lemon*"); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (holding that school district's order directing teacher not to leave his bible in sight or read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause"); *cf. Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that 'compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.'" (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995)))). Indeed, our own court has said as much. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100 (3d Cir. 2009).

Stratechuk maintains that this alleged purpose is a "sham" because the Establishment Clause does not require a prohibition on performing religious music and "[v]irtually every court that has been asked to review year-end holiday concerts or music programs that have included religious music or music associated with religious holidays has upheld them." Appellant's Reply Br. at 19-20. In support of this assertion, Stratechuk cites cases from the Eighth, Tenth, and Fifth Circuits that upheld the constitutionality of performing religious music in public schools. Appellant's Reply Br. at 20 (citing *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 562 (10th Cir. 1997) (upholding Utah school policy permitting music teacher to select explicitly Christian music and Christian religious sites for performance of school choir); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) (upholding Texas high school's practices, such as permitting choir to use

Christian religious song as its theme song); *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1319 (8th Cir. 1980) (upholding South Dakota school policy that permitted music "having religious themes or basis," including Christmas carols, as "part of the curriculum for school-sponsored activities and programs if presented in a prudent and objective manner . . . .")).

The cases cited by Stratechuk all upheld the policy of the respective schools or school districts. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music.

Moreover, as the District Court noted, the assumption "that the Establishment Clause does not require the restrictions enacted by Defendants . . . does not automatically render Defendants' stated purpose a 'sham.'" *Stratechuk*, 577 F. Supp. 2d at 744. In other words, even if performance of religious songs did not violate the Establishment Clause, it does not follow that the goals underlying the School District's desire to avoid a potential Establishment Clause violation were disingenuous or impermissible.

A similar issue was raised in *Bishop v. Aronov*, 926 F.2d 1066, 1077 (11th Cir. 1991). In that case, a University had placed certain limits on a professor's in-class comments regarding religion. The court upheld those limits under the *Lemon* test even assuming that the comments did not violate the

Establishment Clause. The court explained that "the restrictions neither advance nor inhibit religion – to the contrary, the University . . . simply attempted to maintain a neutral, secular classroom . . . ." *Id.*

As the District Court noted, the October 2004 Memo "was spurred by at least one parent's complaint," as well as the practical impossibility of including every religion in a December holiday concert. *Stratechuk*, 577 F. Supp. 2d at 744. In fact, the concerns that led to the October 2004 Memo were the very type of concerns underlying the Establishment Clause jurisprudence in this area, i.e., the need for government neutrality towards religious institutions and beliefs, *McCreary County*, 545 U.S. at 860, and the impressionability of young children, *Edwards*, 482 U.S. at 583-84. In addition, as Amici note, "the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves . . . ." Amici Br. at 33.

Moreover, as the School District points out, Stratechuk's argument that the purpose of the "current interpretation of Policy 2270 is to unconstitutionally disapprove of religion and, in particular, Christianity . . . is based largely upon plaintiff's inaccurate factual contention that defendants' policy amounts to a ban on religious music in the school system." Appellee's Br. at 37. To the contrary, it is clear that the policy, as interpreted, does not prevent – and the record shows that it has not in fact prevented – the teaching of religious holiday songs

in the classroom or the performance of songs with religious content at the December concerts (albeit not songs specifically related to winter holidays).

It follows that the District Court did not err in holding that the School District's actions did not have an impermissible purpose within the meaning of *Lemon*.

Turning to the *Lemon* test's effect prong, which considers whether the "principal or primary effect" of the challenged policy or practice "advances []or inhibits religion," *Lemon*, 403 U.S. at 613, we note Justice O'Connor's explanation that "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval," *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). "While an adjudication of [a policy's] effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 620 (1989) (opinion of Blackmun, J.). In a passage describing the endorsement test that is often quoted to describe the effects prong of the *Lemon* test, Justice O'Connor also noted that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Id.* at 630 (O'Connor, J., concurring).

Stratechuk argues that the "'effect' of the School District's ban on the performance of religious music,

irrespective of any alleged 'purpose,' conveys a message of disapproval of religion . . . ." Appellant's Br. at 44. For example, Stratechuk maintains that "[t]he reasonable observer would know that the MLK Gospel Choir was permitted in the past to perform traditional Christmas religious music at the Columbia High School Holiday Assembly but has now been banned from performing at this event pursuant to the School District's new policy. . . . In the final analysis, an informed, reasonable observer would conclude that [the policy] has the effect of disfavoring religion. . . ." Appellant's Br. at 46-47.

The District Court rejected this argument, concluding that "there is ample evidence available to the objective observer regarding the interpretation of Policy 2270 in the totality of the circumstances, which removes any claim that it conveys a message of disapproval of religion." *Stratechuk*, 577 F. Supp. 2d at 746. To this effect, the Court noted that the policy permits the inclusion of "religious material when appropriate, provided that it is presented objectively and that it fits within the curriculum." *Id.* The Court also noted that the policy requires "[a]ccomodat[ion of] student-initiated expression[s] . . . which reflect their beliefs or non-beliefs about religious themes. . . ." *Id.* (internal quotation omitted). "Moreover, Policy 2270 allows for the use of religious music, provided it achieves specific goals of the music curriculum." *Id.* (internal quotation omitted).

Moreover, the District Court also noted that "[a]lthough the interpretation of Policy 2270 restricts the performance of holiday music during the December concerts, music teachers have indicated that they continue to teach those songs in the classroom . . . and

Director of Fine Arts Santoro has confirmed the appropriateness of this practice." *Id.* at 747.

Similarly, the District Court emphasized that songs with religious content have continued to be played at the December concerts since promulgation of the October 2004 Memo, as the policy "simply restricts the performance of holiday music at the time of the religious holiday that the music honors." *Id.* On this basis, the District Court had ample reason to conclude as follows: "Given the continued performance of religious songs and the continued teaching of holiday music in the classroom, the objective observer would not determine that the implementation of Policy 2270 . . . sends a message of disapproval of religion." *Id.*

We note with approval the District Court's observation that the restriction on "the performance of holiday music, which changed earlier practices within the School District . . . . [did not] automatically convey a message of disapproval of religion because as the Supreme Court observed in *County of Allegheny*, '[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state.'" *Id.* at 747-48 (quoting 492 U.S. at 610). This point is elaborated in the Amici's brief which states that "Establishment Clause jurisprudence recognizes that neutrality towards religion is quite distinct from hostility towards it." Amici Br. at 17. The brief cites an Eleventh Circuit opinion that states that "[a] contrary conclusion would 'totally eviscerate the establishment clause.'" Amici Br. at 17 (quoting *Smith v. Bd. of Comm'rs*, 827 F.2d 684, 693 n.9 (11th Cir. 1987)). *Smith* also quoted a Ninth Circuit case, *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1536 (9th Cir. 1983) (Canby, J., concurring), which stated that "distinctions

must be drawn to recognize not simply 'religious' and 'anti-religious,' but 'non-religious' governmental activity as well.'" As the Amici note:

> Were that not the case, almost every government action vis-a-vis religion would fall into one of two columns – pro- or anti-religion, promoting or hostile to – and be subject to Establishment Clause attack in either event. That is the logic of Plaintiff's legal theory; indeed, that theory would, ironically, subject actions that sought to allow more religious content to that same black or white analysis.

Amici's Br. at 18. Numerous courts have rejected the suggestion that "secular" means "anti-religious." *See, e.g.*, *County of Allegheny*, 492 U.S. at 610-11; *Smith*, 827 F.2d at 693-94; *Grove*, 753 F.2d at 1536 (Canby, J., concurring).

We reject Stratechuk's argument that the fact that numerous students and parents have petitioned the school board and strongly urged it to reverse its policy "demonstrat[es] beyond genuine dispute that a reasonable observer could only perceive that the policy disfavors religion." Appellant's Br. at 26. The constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000) (rejecting argument that school prayer policy was constitutional because it was approved by vote of the student body).

The fin. l prong of the *Lemon* test considers whether the challenged policy or practice "foster[s] an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13 (internal citation omitted). As now-Justice Alito wrote when he was a member of this court, an excessive entanglement "requires more than mere '[i]nteraction between church and state,' for some level of interaction has always been 'tolerated.'" *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (quoting *Agostini v. Felton*, 521 U.S. 203, 233 (1997)). In *Agostini*, the Supreme Court explained that the "factors employed 'to assess whether an entanglement is "excessive" are similar to the factors . . . use[d] to examine "effect."'. . . Thus, we must look to 'the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Id.* at 534-35 (quoting *Agostini*, 521 U.S. at 232).

Stratechuk argues that the School District's policy causes excessive entanglement because "school officials will be required to screen music to determine whether it is religious or secular in nature [and] [d]rawing such distinctions between secular and religious themes will necessarily cause an entanglement with religion." Appellant's Br. at 48. The District Court acknowledged that the interpretation of the policy "involves some entanglement with religion" because the teachers must make selections with religious concerns in mind and because Santoro must approve these selections. *Stratechuk*, 577 F. Supp. 2d at 748. However, the Court concluded that "[t]his type of oversight - this drawing of distinctions between secular and religious themes - strikes the Court as no different from the screening that school districts engage in every day to ensure neutrality in matters of religion." *Id.* at 749. The District Court also observed

that "[t]o conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause." *Id.* We agree, and conclude that when examined under the *Lemon* test, Policy 2270 does not contravene the Establishment Clause.

B. The Endorsement Test

In light of the critique of the *Lemon* test, we also consider Stratechuk's claim that Policy 2270 fails the "endorsement test," a modification of the *Lemon* test. This test "dispenses with *Lemon*'s 'entanglement' prong and, combining an objective version of *Lemon*'s 'purpose' prong with its 'effect' prong, asks whether a reasonable observer familiar with the history and context of [a religious] display would perceive [it] as a government endorsement of religion." *Modrovich v. Allegheny County*, 385 F.3d 397, 401 (3d Cir. 2004) (citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). In addition, "[t]he endorsement test asks whether the government action has 'the effect of communicating a message of government endorsement or disapproval of religion.'" *Id.* (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

The District Court held that this test did not apply because "this matter does not involve a religious display on government property or state participation in a religious activity." *Stratechuk*, 577 F. Supp. 2d at 742 n. 8. There is merit to Stratechuk's argument that this court has not limited the endorsement test to cases involving religious displays on government property. *See, e.g.*, *ACLU v. Black Horse Pike Reg'l Sch. Bd.*, 84 F.3d 1471, 1486-87 (3d Cir. 1996) (en

banc) (applying endorsement test to challenge to student-led prayer at high school graduation).

As this court stated in that case, "[t]his endorsement test has at times been characterized as part and parcel of the *Lemon* test, and at other times as separate and apart from it. Whether 'the endorsement test' is part of the inquiry under *Lemon* or a separate inquiry apart from it, the import of the test is the same. We must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Id.* at 1485-86. The result is the same under the endorsement test as under the effects prong of the *Lemon* test and our earlier conclusion that the School District's policy does not exhibit endorsement or hostility towards religion is equally applicable here.

C. Additional First Amendment Claim

Stratechuk does not limit his First Amendment challenge to the Establishment Clause but also argues that the School District has violated his children's (and his) First Amendment rights by "seek[ing] to 'contract the spectrum of available knowledge' for its students by banning certain religious music from curricular and co-curricular activities and events simply because it is religious or associated with a religious holiday." Appellant's Br. at 51. We see no merit in this argument.

Stratechuk asserts that, through Policy 2270 as interpreted, "the government is seeking to remove an entire category of 'ideas' from the curriculum." Appellant's Br. at 50 n.9. Presumably, Stratechuk equates "ideas" with religious celebratory music.

Assuming without deciding the validity of this equation, Stratechuk's assertion is incorrect. There is no restriction of the students' access to the "ideas" to which he refers because the students have access to religious celebratory music in the classroom within the framework of the curriculum.

The District Court construed Stratechuk's argument as contending that Policy 2270 as interpreted violates his children's right to receive information and ideas. This led the District Court to an analysis of the Supreme Court's decisions in *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982), and *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The District Court noted that *Pico* dealt with the right to receive ideas (the school board's decision to remove certain books from the school district's libraries) whereas *Kuhlmeier* dealt with the right to express ideas (censoring the student newspaper). The District Court stated that although *Pico* seemed on the surface more applicable to Policy 2270, it concluded that applying *Kuhlmeier* was more appropriate because the Supreme Court in that case addressed the issue as "whether the First Amendment requires a school affirmatively to promote particular student speech." 484 U.S. at 270-71. Because the *Kuhlmeier* Court held that the forum at issue in that case, the high school newspaper, was not a public forum, the school authorities had the discretion to "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273:

Using *Kuhlmeier* as precedent, the District Court in this case concluded that the December concerts are not public fora, and that the School District's interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns. On that basis the District Court granted the defendants' motion for summary judgment with respect to Stratechuk's First Amendment claim. We see no error of law or abuse of discretion in the District Court's analysis.

IV.

Conclusion

We do not doubt Stratechuk's sincerity and commitment to the position he vigorously asserts in this litigation. But the overriding consideration for this court is that the School District administers public schools, and there are constitutional principles that govern the actions of public schools that do not limit private schools. Certainly, those of us who were educated in the public schools remember holiday celebrations replete with Christmas carols, and possibly even Chanukah songs, to which no objection had been raised. Since then, the governing principles have been examined and defined with more particularity. Many decisions about how to best create an inclusive environment in public schools, such as those at issue here, are left to the sound discretion of the school authorities. We see no constitutional violation in Policy 2270 or its application in this case.

We will therefore affirm the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3826

[Filed November 24, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-04-cv-06189)
District Judge: Honorable William H. Walls

Before: SLOVITER, FUENTES, and
SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on September 14, 2009.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered August 28, 2008, be and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Attest:

/s/Marcia M. Waldron
Clerk

Dated: November 24, 2009

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-6189 (WHW)

[Filed August 29, 2008]

MICHAEL STRATECHUK, individually and on behalf of his minor children,	)
Plaintiff,	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as Board President, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, in his official capacity as Superintendent, South Orange-Maplewood School District,	)
Defendants.	)

OPINION

Walls, Senior District Judge

Pursuant to Fed. R. Civ. P. 56, Plaintiff Michael Stratechuk moves for summary judgment on his first claim, alleging that "Defendants have conveyed the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity, in violation of the Establishment Clause." Defendants Board of Education, South Orange Maplewood School District (the "School Board"), Brian F. O'Leary, and Peter P. Horoschak ("Superintendent Horoschak") also move for summary judgment pursuant to Fed. R. Civ. P. 56, to dismiss Plaintiff's Amended Complaint in its entirety. The Court held oral argument on the motions for summary judgment on July 31, 2008. Defendants' motion for summary judgment is granted; Plaintiff's motion for summary judgment is denied.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Michael Stratechuk is the father and legal guardian of two minor children who live in the School District of South Orange and Maplewood, New Jersey (the "School District"). (Pl.'s Statement of Material Facts (No. 36-2) ("Pl.'s S.F.") ¶ 1.) During the 2004-2005 school year – the relevant time period – one of Plaintiff's children attended Columbia High School and the other attended Maplewood Middle School. (*Id.* ¶ 2.)

On April 2, 2001, the School Board adopted Policy 2270, Religion in the Schools. According to Policy 2270:

> It is the goal of the [School District] to foster mutual understanding and respect for the right of all individuals regarding their beliefs, values and customs. In pursuing this goal, we recognize that we serve a diverse community with varying cultural, ethnic and religious orientation.
>
> We are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools.
>
> Music, art, literature, dance and drama along with religious customs and traditions, which have come to us from various elements of our national population, may be used to broaden our pupils' awareness of the many elements that comprise our diverse American culture.

(Cert. of Michael F. O'Neill ("O'Neill Cert."), Ex. A (No. 37-4) at SO0140.) Given this goal the School Board adopted the following practices regarding the "Treatment of Religion in the Curriculum:"

> 1. Permit the inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view.

2. Accommodate student-initiated expression in response to questions or assignments which reflect their beliefs or non-beliefs about religious themes.

    a. Students are free to express religious belief or non-belief in compositions, works of art, music, speech and debate. Provisions should be made so that such expression is neither encouraged nor discouraged, but is handled in a courteous and respectful manner.

3. Only permit religious symbols to teach about historical or cultural context, not to promote or celebrate religious concepts, events or holidays.

    a. Classroom use and/or display of religious symbols is permitted on a temporary basis as a teaching resource or aide only within the framework of the curriculum. The use and/or display of religious symbols should provide an environment whereby students of all faiths, beliefs or non-beliefs can participate without betraying their own faith or beliefs.

(Id., Ex. A at SO0140-41.) Moreover, the School Board adopted the following practices regarding the "Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts:"

1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However,

opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.

2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.

3. Decorations with religious significance are not permitted.

4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.

    a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays

(Id., Ex. A at SO0141.)

Before the 2004-2005 school year, holiday music, including traditional Christmas carols and Hanukkah songs, was performed at the School District's December concerts. (Pl.'s S.F. ¶¶ 3-4; Defs.' Br. in Support of Summ. J. (No. 37-2) ("Defs.' Supporting Br.") at 5.) In the Fall of 2003, music teacher William Cook contacted Sharon Cohen, a parent of one of his

students, "who objected to her daughter playing certain music that we were doing at a concert" and who stated that "she didn't want her daughter to play the music at the concert." (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 35:19-36:10, 40:10-18.) Ms. Cohen also told Mr. Cook that "Christianity was forced upon her in her youth." (Id., Ex. C, Ex. 4.) Mr. Cook advised the Director of Fine Arts, Nicholas Santoro ("Director of Fine Arts Santoro"), of his conversation with Ms. Cohen, and Director of Fine Arts Santoro recounted the situation to Assistant Superintendent James Memoli ("Assistant Superintendent Memoli"). (Id.)

On January 21, 2004, Ms. Cohen sent Superintendent Horoschak a letter, complaining that "the selection of music [at the South Orange Middle School 2003 December concert], both instrumental and vocal, had a clear religious orientation and focused on religious holidays. . . . in direct violation of the Board policy # 2270 4 (a)."[1] (Decl. of Attorney Robert J. Muise (No. 38), Ex. P-5 at SO0212-13.) On March 1, 2004, Superintendent Horoschak responded to Ms. Cohen's letter, noting that with respect to the 2003 December concert, "[i]t was our judgment that because of the variety of both secular and 'holiday' (i.e.,

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[1] According to Superintendent Horoschak, he had a general recollection of parents' expressing similar concerns regarding the subject matter of the December concerts during the time period between 1998 and 2003, although he could not remember any specific instance other than one where a Muslim parent raised concerns that his/her faith was not represented during the concert. (O'Neill Cert., Ex. B (No. 37-5) at 53:13-57:1.) Additionally, Assistant Superintendent Memoli stated that he "know[s] there have been other complaints over the years," but he "can't name the individuals." (Id., Ex. E (No. 37-8) at 23:24-25:3.)

Hanukkah and Christmas) selections . . . there was not one particular focus on a particular religion or religious group, and, as such, there was no attempt to advance any religious point of view." (Pl.'s Mot. for Summ. J., Ex. F (No. 36-10), Ex. P-6 at SO0375.) Superintendent Horoschak continued, however, that although "[w]e are cognizant of the policy, and are careful to follow it. . . . concerns raised by parents regarding the holiday concert at South Orange Middle School suggest that the policy needs further clarification." (Id.) Further, he stated that "Assistant Superintendent Jim Memoli and Director of Fine Arts Nicholas Santoro are engaged in on-going discussions about such musical programs, and they will recommend to me suggested language for regulations which should clarify what types of programs and activities are permissible and not permissible under this policy." (Id.)

On or about March 24, 2004, Superintendent Horoschak had his annual performance review with the School Board.[2] (Defs.' Supporting Br. at 5.) At this

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[2] At least one of the School Board members who was at the performance review was Shelly Slafkes. (Pl.'s S.F. ¶ 9.) She is a "good acquaintance" of Ms. Cohen. (Id. at n.6.) During the November 22, 2004 meeting of the School Board, she stated that "[i]t is my strongly held belief that school assemblies and other school activities should not contain religious content in our music." (Pl.'s Mot. for Summ. J., Ex. H (No. 36-13) at 28:8-10.) Ms. Slafkes suggested that "[w]hen religious content is included, many children – and I could speak for how I felt as a youngster – feel both uncomfortable and forced to choose between the chorus or band and their religious beliefs," and expressed her opinion that "the only way that the school district can respect the differences and beliefs of each person in our diverse communities is by eliminating religious celebration in our public schools." (Id.,

review, the issue of the implementation of Policy 2270 with respect to the December concerts was raised. (O'Neill Cert., Ex. B (No. 37-5) at 111:9-113:13.) According to Superintendent Horoschak, "board members had heard from some community members about instrumental music that they felt, people felt represented a celebration of Christmas holidays and also there ha[d] been discussion about the fact that you really can't balance all religious groups in these representations in these types of performances." (Id., Ex. B at 113:2-11.) Ultimately, the School Board indicated that the outcome that it desired was "that [Policy 2270] would be consistently implemented, that it be supervised, that there wouldn't be so much discretion at every – by every faculty member," (id., Ex. B at 114:2-10), and discussed with him drafting regulations regarding Policy 2270, (Defs.' Resp. to Pl.'s Statement of Material Facts (No. 43-2) ¶ 8; see Pl.'s S.F. ¶ 8.)

In September 2004, Director of Fine Arts Santoro held a department meeting, wherein he "discussed [with the School District music staff] how I would be approving their programs and that we could do religious music," but they should "try to avoid the holiday music." (O'Neill Cert., Ex. H (No. 37-11) at 57:13-24.) At that time, Director of Fine Arts Santoro had not yet told the School District music staff that "Christmas Carols [were] out". (Id., Ex. H at 58:3-5.) On October 14, 2004, Superintendent Horoschak met

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Ex. H at 28:10-18.) Ms. Slafkes noted, however, that "I do believe strongly that as part of the social studies, language arts, and other curriculum areas, we should and for the most part do teach our children about each religion and culture, their beliefs and holidays." (Id., Ex. H at 30:9-13.)

with Director of Fine Arts Santoro, Assistant Superintendent Memoli, and the School District's attorney, Ellen Bass (the "October 14, 2004 meeting"), "to review the requirements of Policy 2270 . . . and to resolve various parent concerns regarding the implementation of the policy." (Id., Ex. I (No. 37-12) at SO0142; see Pl.'s S.F. ¶¶ 13-14.) According to Assistant Superintendent Memoli, the discussion at that meeting involved "what we do for the students in this district, what is best for them so that we feel that we're treating everyone on an equal basis, what was educationally sound," (Defs.' Reply Br. in Support of Mot. for Summ. J. ("Defs.' Reply Br."), Ex. B (No. 45-4) at 53:5-15), and making sure that "no child feels uncomfortable in celebrating a holiday that wasn't their own," (id., Ex. B at 59:23-25). Assistant Superintendent Memoli stated that he "want[s] the students to feel comfortable when they're in this school system building and in their classroom; and, anything that makes them uncomfortable effects [sic] their ability to learn." (Id., Ex. B at 57:6-12.)

Director of Fine Arts Santoro drafted a memorandum to the School District music staff on October 29, 2004 (the "October 29, 2004 memorandum"), forwarding the decisions made at the October 14, 2004 meeting. (O'Neill Cert., Ex. I (No. 37-12) at SO0143; Pl.'s S.F. ¶ 19.) Director of Fine Arts Santoro wrote that "in my three-plus years in the district, I have been reviewing your programs to insure [sic] that we are in compliance with [Policy 2270],"[3]

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[3] Before 2004, Santoro did not object to any music on the basis of its content, including that performed during the December concerts. (Pl.'s S.F. ¶¶ 17-18.)

and that following the meeting, " I now have a clearer picture of the expectations of [Policy 2270]." (O'Neill Cert., Ex. I (No. 37-12) at SO0143; see Pl.'s S.F. ¶¶ 15-16.) Director of Fine Arts Santoro continued that "[i]n short, we will continue to use common sense when selecting music for the Holiday concerts," but also presented six specific bullet points:

- All programs will be reviewed and approved by me. To save time and effort, I will come to you to look at your repertoire. Please let me know when I can do this.

- We will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc. This holds true for any vocal or instrumental setting.

- I would strongly suggest you gear towards the seasonal selections -- Winter Wonderland, Frosty The Snowman, etc. Music centered on Peace is also a nice touch.

- For the High School, the Brass Ensemble repertoire must also adhere to this policy, so the traditional carols must be eliminated from the repertoire.

- The MKL [sic] Gospel Choir cannot perform at the CHS Holiday Assembly for the student body.

- Your printed programs for any Holiday concert must avoid graphics which refer to

> the holidays, such as Christmas Trees and dreidels.

(O'Neill Cert., Ex. I (No. 37-12) at SO0143; Pl.'s S.F. ¶¶ 20-22, 24-25.)

Following the issuance of the October 29, 2004 memorandum, Director of Fine Arts Santoro explained its contents in greater detail "when responding to direct inquiries from the faculty." (Defs.' Supporting Br. at 7.) As example, in response to an e-mail from music teacher Barbara Eames, Director of Fine Arts Santoro clarified that "according to the policy, you can teach about the different holidays in your music classes" as "[c]lassroom work is not a 'program'" within the meaning of Policy 2270. (O'Neill Cert., Ex. J (No. 37-13).) In response to another e-mail from Ms. Eames, Director of Fine Arts Santoro indicated that Vivaldi Gloria (Cum Sancto Spiritu) could be performed under Policy 2270 because "[t]he program does not have a religious orientation and it does not refer to a holiday." (Id., Ex. K (No. 37-14).) Further, Director of Fine Arts Santoro noted that Ms. Eames "CAN teach about the holidays in class as it is presented in [Policy 2270]." (Id.)

In addition, Director of Fine Arts Santoro began to receive programs from the School District music staff in order to determine whether they were in accord with Policy 2270. As example, on November 16, 2004, Mr. Cook sent Director of Fine Arts Santoro a letter with the following message:

> Nick:

For the Holi...uh, Ram...uh, Hanuk...uh, Chri...uh, December concert the 7th & 8th grade Orchestras at SOMS and MMS will be performing the following:

The Star Spangled Banner by Key
The Great Gate of Kiev by Mussorgsky
Hava Nagila - traditional
Concerto in D by JS Bach
Winter Wonderland (maybe) by Smith and Bernard

I will try to keep all references to the birth of You Know Who, the 8 days of You Know What and the R Month to a minimum.

Thank you for your consideration.

(Pl.'s Mot for Summ. J., Ex. C (No. 36-6), Ex. 8.) On November 17, 2004, John DeVita, faculty advisor for the MLK Gospel Choir, sent a memorandum to Director of Fine Arts Santoro proposing "to sing the first verse of 'Lift Every Voice and Sing' in honor of Quanza (a non religious holiday)" and including the lyrics. (Id., Ex. M (No. 36-19) at S00479.)

During November and December 2004, the School District received a number of complaints from members of the South Orange and Maplewood, New Jersey community, (id., Exs. F (Nos. 36-10 & 36-11), Exs. P-11 - P-12, P-57, P-62 - P-65, P-67 & K (No. 36-17)), including from the South Orange Village

President, (id., Ex. F (No. 36-10), Ex. P-13).[4] In addition, members of the community lodged complaints during meetings of the School Board on November 15 and 22, 2004. (Id., Exs. H (No. 36-13) & J (No. 36-16).) Seventeen members of the Maplewood, New Jersey community signed a "Petition Asking the Board of Education to Honor Religious Tolerance." (Id., Ex. F (No. 36-11), P-78.) On November 22, 2004, the co-Presidents of the Columbia High School Music Parents' Association sent a letter to Superintendent Horoschak and the School Board "formally request[ing] a review and reinterpretation" of Policy 2270. (Id., Ex. F, Ex. P-68.) "The district's music teachers" addressed a letter to Superintendent Horoschak and the School Board on November 23, 2004, "to express their extreme concern and their intense opposition to the change in the interpretation of the district's holiday music policy." (Id., Ex. F, Ex. P-66.) A "posting" by an individual identified as "Albatross" and "a graduate of Columbia[] [High School's] music program," indicated that the Columbia High School Brass Ensemble's "repertoire is maybe 90% works attached to either Christmas or Channukah," and as a result, "**[t]he remaining repertoire is not sufficient to satisfy the performance requirements of a holiday brass group,**" (id., Ex. E (No. 36-8), Ex. P-6), a contention with which Director of Fine Arts Santoro agreed, (id., Ex. E at 56:18-57:4). And, "[t]he members and advisors of the Martin Luther King Jr. Association Gospel Choir," which was now restricted from

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[4] Additionally, the School District received letters and e-mails from around the country, mostly during the period between November and December 2004. (Pl.'s Mot. for Summ. J., Ex. F (Nos. 36-10 & 36-11), Exs. P-15 - P-20, P-22 - P-52, P-71.)

performing at the Columbia High School December concert, despite having done so in the past, noted its objection in a December 1, 2004 letter. (Id., Ex. F (No. 36-10), Ex. P-14.) Steve Lonegan, the mayor of Bogota, New Jersey, contacted Superintendent Horoschak on December 16, 2004, to request "permission to assemble people on the street outside of Columbia High School on December 21, 2004 at 5:00 PM for a festive presentation of traditional Christmas Carols and Hanukkah Hymns." (Id., Ex. F (No. 36-11), Ex. P-53; see id., Ex. F, Exs. P-55 - P-56.) Superintendent Horoschak denied Mr. Lonegan his permission. (Id., Ex. F, Ex. P-55.)

According to the programs of concerts during and after 2004, songs with religious content that have been performed in the School District include – (1) Concerto VIII Fatto per la notte de natale; (2) Wade in the Water; (3) Waters of Babylon; (4) Agnus Dei/Cum Sanctis; (5) Laudamus Te; (6) Jubilate; (7) Ich will dem Hern; and (8) Cum Sancto Spiritu. (Defs.' Supporting Br. at 9; see O'Neill Cert., Exs. M (37-16) & N (37-17).) According to Mr. Cook, Policy 2270 "didn't prohibit all religious music," but only "prohibited music based on – or themes familiar – or themes consistent with pieces commonly associated with the holiday at the time of the holiday."[5] (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12; see id., Ex. C at 73:6-12.) Music teachers have continued to teach holiday songs that used to be performed in the December concerts in their

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[5] Director of Fine Arts Santoro also stated that songs celebrating "a non-religious holiday," such as Kwanza purportedly is, can be performed during the December concerts. (Pl.'s Mot. for Summ. J., Ex. E (No. 36-8) at 35:19-36:2.)

classrooms, as well as other holiday music such as the "Nutcracker." (Id., Ex. I (36-14) at 43:5-18; O'Neill Cert., Ex. L (No. 37-15) at 43:5-44:7.) Director of Fine Arts Santoro confirmed that "[i]n performance concerts [certain] selections would not be allowed," but "[i]n the curriculum they would be allowed to be taught." (O'Neill Cert., Ex. H (No. 37-11) at 32:8-13.)

Director of Fine Arts Santoro continues to review programs for the December concerts. As example, on November 29, 2005, he received the following e-mail from music teacher Vern Miller:

> Hi Nick,
>
> Both Middle School Bands and Orchestras will be joyantly performing the following pieces:
>
> 1. Oh, Holy Night
> 2. Angels We Have Heard On High
> 3. We Three Kings
>
> We will be joined by the school choruses singing these selections while we play.
>
> Additionally, all performances will begin with a prayer and reading from the Holy scriptures.
>
> THOUGHT YOU MIGHT APPRECIATE OUR EFFORTS TO COMPLY WITH THE BOARD'S HOLIDAY MUSIC POLICY!!!
>
> In truth,
>
> MMS Concert: Monday, Dec 12th, 9:30 a.m.
> Winter Wonderland
> Dorian Rhapsody

Sing, Sing, Sing

SOMS Concert: Tuesday, Dec 13th, 9:30 a.m.
Winter Wonderland
Dorian Rhapsody

(Pl.'s Mot. for Summ. J., Ex. C (No. 36-6), Ex. 9.)

On October 10, 2005, the School Board adopted a new Policy 2270, Religion in the Schools, which is identical to the old Policy 2270, aside from its exclusion of this language – "Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (See O'Neill Cert., Ex. O (No. 37-18) at SO0148.) In addition, on that same date, the School District's administration adopted Regulation 2270, Religion in the Schools, to implement the new Policy 2270. Regulation 2270 includes headings such as "Teaching of Religion as Part of the Curriculum," "Religion as part of the Music and Art Curricula," and "Celebration of Religious Holidays Prohibited." (Id., Ex. P (No. 37-19).)

Plaintiff filed his Complaint in this action on December 14, 2004, and his Amended Complaint on March 22, 2005. Plaintiff alleges a civil rights violation under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, asserting that "Defendants have conveyed the impermissible, government-sponsored message of disapproval of and hostility toward religion, including Christianity, in violation of the Establishment Clause," (the "Establishment Clause claim"), (Am. Compl. (No. 5) ¶ 21), and that "Defendants have unconstitutionally deprived Plaintiff and his minor children of their right

to receive information and ideas, their right to learn, and their right to academic freedom, which are guaranteed under the First Amendment" (the "First Amendment claim"),[6] (id. ¶ 24).

On May 16, 2005, Defendants filed a motion to dismiss, which the Court granted on September 29, 2005. Upon consideration, over Plaintiff's objection, of Policy 2270, the Court concluded that "Plaintiff[] ha[s] not alleged any facts that if established would entitle [him] to any relief under the Establishment Clause" and that Plaintiff's claim under the First Amendment as to his children's right to receive information and ideas should be dismissed. (Op. (No. 13) at 16, 17.) On October 5, 2006, the Third Circuit vacated the Court's September 29, 2005 Order and remanded the case for further proceedings. The Third Circuit objected to the Court's consideration of Policy 2270, noting that "the policy Stratechuk describes is more restrictive than the one set forth in the publicly available materials" meaning that "the official policy was not 'integral to or explicitly relied upon in the complaint.'" Stratechuk v. Bd. of Educ., 200 Fed. Appx. 91, 94 (3d Cir. 2006). The Third Circuit held that "a categorical ban on exclusively religious music, enacted with the express purpose of sending a message of disapproval of religion, appears to state a claim under the First Amendment." Id.

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[6] The Court recognizes that the Establishment Clause is as much a part of the First Amendment as the "right to receive information and ideas, the[] right to learn, and the[] right to academic freedom." For ease, however, the Court will refer to Plaintiff's non-Establishment Clause claim as the "First Amendment claim."

Plaintiff filed his motion for summary judgment on January 10, 2008, followed by Defendants' motion for summary judgment on January 11, 2008, and the Court held oral argument on the two motions on July 31, 2008.

LEGAL STANDARD

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-moving party, and it is material if, under the substantive law, it would affect the outcome of the suit. Id. at 248. The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). To survive a motion for summary judgment, the non-moving party must

present more than a mere scintilla of evidence in his favor. Woloszyn v. County of Lawrence, 396 F.3d 314, 319 (3d Cir. 2005). The non-moving party must go beyond the pleadings and, by affidavits or other evidence, designate specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. "Conclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment." Olympic Junior, Inc. v. David Crystal, Inc., 463 F.2d 1141, 1146 (3d Cir. 1972).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. Id. at 255; Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002).

DISCUSSION

There is no genuine issue of material fact(s) between the parties.[7] There are intense clashes

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[7] There is a dispute between Plaintiff Michael Stratechuk and Defendants as to the source of the policy restricting the performance of holiday music during the December concerts. Plaintiff asserts that he has no issue with Policy 2270, and instead, his issue is with the October 29, 2004 memorandum, which he claims created an entirely new policy with respect to the performance of holiday music during the December concerts. Defendants, however, argue that the October 29, 2004 memorandum simply presented an interpretation of certain language that was already a part of Policy 2270 – i.e., "[m]usic

between them as to the legal import and significance of the undisputed facts.

The Supreme Court "has long recognized that local school boards have broad discretion in the management of school affairs." Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863, 102 S. Ct. 2799, 2806 (1982). As a result, "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968).

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programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays."

The Court finds that the source of the policy restricting the performance of holiday music during the December concerts is Policy 2270, viewed through the interpretive lens of the October 29, 2004 memorandum. The October 29, 2004 memorandum was an outgrowth of the October 14, 2004 meeting. The purpose of that meeting was "to review the requirements of Policy 2270 . . . and to resolve various parent concerns regarding the implementation of the policy." (O'Neill Cert., Ex. I (No. 37-12) at SO0142.) Although the meaning of the terms "focus on religious holidays" changed after the October 14, 2004 meeting and the issuance of the October 29, 2004 memorandum, Policy 2270 still remained the source of the School District's policy regarding the performance of holiday music during the December concerts. The October 29, 2004 memorandum simply presented the reinterpretation of Policy 2270, as agreed to during the October 14, 2004 meeting.

Hereinafter, the Court will refer to the policy restricting the performance of holiday music during the December concerts as the "reinterpretation of Policy 2270."

Courts, however, must not ignore that "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" Id. (quoting Shelton v. Tucker, 364 U.S. 479, 487, 81 S. Ct. 247, 251 (1960)).

Plaintiff Michael Stratechuk asserts that the interpretation of Policy 2270 violates his children's rights under the Establishment Clause and "their right to receive information and ideas, their right to learn, and their right to academic freedom" in violation of the First Amendment, necessitating this Court to overcome the deference that it would traditionally give to decisions of a local school board. The Court concludes, however, that the interpretation of Policy 2270 does not violate the Establishment Clause or Plaintiff's children's other First Amendment rights.

1. The Establishment Clause Claim

Plaintiff's first claim is that the interpretation of Policy 2270 violates the Establishment Clause because it "convey[s] the impermissible, government-sponsored message of disapproval of and hostility toward religion." According to the Establishment Clause, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Contained within this Clause is "the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general," Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993), as "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." Epperson, 393 U.S. at 104.

To analyze a claim under the Establishment Clause, courts have traditionally utilized the three-pronged test first articulated by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971).[8] Under the Lemon test, a state action

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[8] Although the Lemon test has been repeatedly criticized, see, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99, 113 S. Ct. 2141, 2150-51 (1993) (Scalia, J., concurring) (likening Lemon to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"), it still remains a viable test for determining whether a governmental action violates the Establishment Clause, see McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 859-67, 125 S. Ct. 2722, 2732-37 (2005) (referencing Lemon's purpose prong), Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 175 (3d Cir. 2008) (listing the Lemon test as one of three tests for determining whether governmental action violates the Establishment Clause). Additionally, courts have utilized two other tests – the coercion test and the endorsement test – to analyze Establishment Clause claims. Despite the existence of these other tests, however, the Court concludes that the Lemon test is the most appropriate for determining whether the interpretation of Policy 2270 violates the Establishment Clause.

"The coercion test looks at whether the government is 'coerc[ing] anyone to support or participate in religion or its exercise.'" Borden, 523 F.3d at 175 n.18 (quoting Lee v. Weisman, 505 U.S. 577, 587, 112 S. Ct. 2649, 2655 (1992)). Although the coercion test "focuses primarily on government action in public education," Modrovich v. Allegheny County, Pa., 385 F.3d 397, 400-01 (3d Cir. 2004), it is inapplicable to this matter because Plaintiff does not allege that the interpretation of Policy 2270 has had a coercive effect on his children.

"The endorsement test . . . asks whether a reasonable observer familiar with the history and context of [a] display would perceive [a] display as a government endorsement of religion." Id. at 401. Despite an earlier Third Circuit opinion limiting the endorsement

violates the Establishment Clause if any of the following are true – (1) it lacks a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. 403 U.S. at 612-13.

A. "Purpose" Prong

"In applying the purpose [prong], it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion.'" Wallace v. Jaffree, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985). "[T]he purpose prong of Lemon only requires some secular purpose, and not 'that the purposes . . . are 'exclusively secular.'" Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 262 (3d Cir. 2003) (quoting Lynch v. Donnelly, 465 U.S. 668, 681 n.6, 104 S. Ct. 1355, 1363 n.6 (1984)). Accordingly, the Supreme Court "has invalidated legislation or governmental action on the ground that a secular purpose was lacking . . . only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." Lynch, 465 U.S. at 680.

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test to "cases involving religious displays on government property," id., 385 F.3d at 401; see Freethought Soc'y of Greater Phila. v. Chester County, 334 F.3d 247, 250, 257, 258 (3d Cir. 2003); Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144, 174 (3d Cir. 2002), the Third Circuit later stated generally that "[t]he endorsement test applies '[i]n cases involving state participation in a religious activity,'" Borden, 523 F.3d at 175 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000)). Regardless of the expansiveness of the applicability of the endorsement test, however, the Court concludes that this matter does not involve a religious display on government property or state participation in a religious activity.

But, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham," Edwards v. Aguillard, 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987), because the purpose prong is not "a pushover for any secular claim," McCreary County, Ky. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 864, 125 S. Ct. 2722, 2736 (2005). "The eyes that look to purpose belong to an "objective observer," one who takes account of the traditional external signs that show up in the "text, legislative history, and implementation of the statute," or comparable official act." Id. at 862. Overall, however, the Third Circuit has stated that the purpose prong is "a 'low threshold,' and courts are generally deferential to the government's proffered secular purpose as long as it is legitimate." Modrovich v. Allegheny County, Pa., 385 F.3d 397, 411 (3d Cir. 2004) (quoting Freethought, 334 F.3d at 267).

Defendants assert that "[t]he performing of celebratory religious music at school-sponsored events is prohibited because such performances are not necessary to achieve the specific goals of the music curriculum and could be perceived as an overt endorsement of religion or an improper focus on religious holidays." (Defs.' Br. in Opp. to Pl.'s Mot. for Summ. J. (No. 43) ("Defs.' Opp. Br.") at 5-6, 8, 12-13.) In other words, Defendants contend that "[t]he Policy, as written and currently interpreted, is clearly designed with the goal of avoiding potential Establishment Clause violations." (Defs.' Supporting Br. at 18.)

Plaintiff responds, however, that "there is no requirement under the Establishment Clause that the

School District ban such music, including Christmas music during the Christmas holiday, from its curricular, co-curricular, or extracurricular activities and events," which "evidence[s] . . . the School District's illicit purpose." (Pl.'s Br. in Support of Mot. for Summ. J. (No. 36-3) ("Pl.'s Supporting Br.") at 34; Pl.'s Br. in Opp. to Def.'s Mot. for Summ. J. (No. 39) ("Pl.'s Opp. Br.") at 32-33; see id. at 14 ("[T]he School District's claimed purpose of 'avoiding potential Establishment Clause violations' in light of the evidence and the well-established case law regarding religious music is plainly a 'sham.'").) Plaintiff concludes that "the School District's policy targets certain music for disfavored treatment ***because it is religious or because it is associated with a religious holiday***." (Pl.'s Supporting Br. at 17, 30, Pl.'s Opp. Br. at 16; Pl.'s Reply Br. in Support of Mot. for Summ. J. (No. 44) ("Pl.'s Reply Br.") at 10.)

As an initial matter, the Court does not dispute Plaintiff's contention that the interpretation of Policy 2270 targets certain music "***because it is associated with a religious holiday***."[9] That fact, however, is

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[9] The Court, however, does question Plaintiff's contention that the interpretation of Policy 2270 targets certain music simply "***because it is religious***." Such a statement does not accord with the text of Policy 2270, which "[p]ermits the inclusion of religious literature, music, drama, dance and visual arts in the curriculum" and which stipulates that "[r]eligious music, like any other music, can only be used if it achieves specific goals of the music curriculum." (O'Neill Cert., Ex. A (No. 37-4) at SO0140-41.) Furthermore, it ignores that performances of religious songs such as Concerto VIII Fatto per la notte de natale, Wade in the Water, Waters of Babylon, Agnus Dei/Cum Sanctis, Laudamus Te, Jubilate, Ich will dem Hern, and Cum Sancto Spiritu have continued, (Defs.' Supporting Br. at 9, see O'Neill Cert., Exs. M

not incompatible with Defendants' stated purpose, nor does it presuppose the conclusion that Defendants' actual purpose is simply to show disapproval of religion. And, Plaintiff has not provided any evidentiary support for his naked assertion that the purpose underlying Defendants' actions was to show disapproval of religion.

Actions taken to avoid potential Establishment Clause violations have a valid secular purpose under the purpose prong of the Lemon test. See, e.g., Vasquez v. Los Angeles ("LA") County, 487 F.3d 1246, 1255 (9th Cir. 2007); Bishop v. Aronov, 926 F.2d 1066, 1077 (11th Cir. 1991); Roberts v. Madigan, 921 F.2d 1047, 1054 (10th Cir. 1990); cf. Borden v. Sch. Dist. of the Twp. of E. Brunswick, 523 F.3d 153, 174 (3d Cir. 2008) ("The Supreme Court has stated that 'compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.'"). Plaintiff, however, argues that Establishment Clause caselaw definitively holds that Defendants need not have placed restrictions on the performance of holiday music at the December concerts, undermining Defendants' stated purpose and thereby rendering that purpose a sham. Establishment Clause jurisprudence, however, defies such a categorical claim. "The Establishment Clause . . . is not a precise, detailed provision in a legal code capable

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(37-16) & N (37-17)), in accordance with Policy 2270, (see Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12), and that music teachers have continued teaching holiday songs that used to be performed in the December concerts in their classrooms, (id., Ex. I (36-14) at 43:5-10; O'Neill Cert., Ex. L (No. 37-15) at 43:5-10), in accordance with Policy 2270, (see O'Neill Cert., Ex. H (No. 37-11) at 32:8-13).

of ready application." Lynch, 465 U.S. at 678. Instead, it "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," Lemon, 403 U.S. at 614, meaning that "each case . . . calls for line drawing" and that "no fixed, per se rule can be framed," Lynch, 465 U.S. at 678. It is unclear whether in the specific circumstances presented in this case, the performance of religious holiday music at the December concerts would violate the Establishment Clause, and the Court declines to render an opinion as to that issue. Accordingly, given the uncertainty inherent in all Establishment Clause-related decisions, the Court concludes that Defendants' stated purpose is not a sham.

Assuming that the Establishment Clause does not require the restrictions enacted by Defendants, however, does not automatically render Defendants' stated purpose a "sham." Evidence suggests that the interpretation of Policy 2270 was spurred by at least one parent's complaint. (See Decl. of Attorney Robert J. Muise (No. 38), Ex. P-5 at S00212-13.) Superintendent Horoschak stated that in his annual performance review where the interpretation of Policy 2270 was considered, it was noted that "you really can't balance all religious groups in these representations in these types of performances." (O'Neill Cert., Ex. B (No. 37-5) at 113:9-11.) And, Assistant Superintendent Memoli indicated that the discussion at the October 14, 2004 meeting revolved around doing "what is best for [the students] so that we feel that we're treating everyone on an equal basis," (Defs.' Reply Br., Ex. B (No. 45-4) at 53:7-10), and making sure that "no child feels uncomfortable in celebrating a holiday that wasn't their own," (id., Ex.

B at 59:23-25). As such even if the Establishment Clause does not necessitate Defendants' actions, the evidence convinces the Court that Defendants' actions were motivated by their professed purpose of prevention of an overt endorsement of religion or an improper focus on religious holidays.

Despite assertions to the contrary, Plaintiff has presented no evidence to support his claim that Defendants' stated purpose was a sham. Moreover, Plaintiff has presented no evidence to support the notion that the purpose behind Defendants' interpretation of Policy 2270 was to show disapproval of religion. In contrast, there is ample evidence to support Defendants' claim that the purpose of the interpretation of Policy 2270 was to prevent an overt endorsement of religion or an improper focus on religious holidays. As a result the Court is satisfied that the interpretation of Policy 2270 had a secular purpose.[10]

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[10] Plaintiff also claims that "based on the totality of the evidence, the only reasonable inference is that the purpose of this policy was to specifically ban the performance of *Christmas* music." (Pl.'s Supporting Br. at 17; Pl.'s Opp. Br. at 17.) Plaintiff believes that "[w]ithout question, Christmas was the target of this policy from its inception" because "Ms. Cohen, the close acquaintance of former board member Shelly Slafkes and the parent who lodged the initial complaint that started the policy revision process, was opposed to *Christmas* religious music." (Pl.'s Supporting Br. at 17; Pl.'s Opp. Br. at 17.) Defendants respond that "Policy 2270 is religiously neutral and bans the performance of *any* religious music which is celebratory of religious holidays," noting that "Hanukkah music, for example, is included within the ban." (Defs.' Opp. Br. at 7-8.)

According to the Supreme Court, "[i]f someone in the

B. "Effect" Prong

"The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." Lynch, 465 U.S. at 690 (O'Connor, J., concurring). Accordingly, courts "must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." Am. Civil Liberties Union of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1486 (3d Cir. 1996). In analyzing a governmental action under the effect prong, the perspective is that of the "reasonable observer." Id. Courts must look to "the 'history and ubiquity' of a practice . . . because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement" or disapproval of religion. County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492

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government hides religious motive so well that the "objective observer, acquainted with the text, legislative history, and implementation of the statute," . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides." McCreary, 545 U.S. at 863 (internal citation omitted). The text of Policy 2270 states that "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (O'Neill Cert., Ex. A (No. 37-4) at SO0141.) The October 29, 2004 memorandum provides that "[w]e will avoid any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah, etc." (Id., Ex. I (No. 37-12) at SO0143.) The broad applicability of the interpretation of Policy 2270 undermines Plaintiff's argument that its purpose is specifically to ban Christmas music.

U.S. 573, 630, 109 S. Ct. 3086, 3121 (1989) (O'Connor, J., concurring in part and concurring in judgment).

Plaintiff argues that "[t]he clear effect of the School District's policy is to show disapproval of religion in violation of the Establishment Clause." (Pl.'s Supporting Br. at 24.) Plaintiff notes that "the reasonable observer would know that the School District has adopted and enforces an official policy that bans only religious music or music associated with a religious holiday and that it was implemented to ban students and student groups from playing traditional Christmas music . . . at various event during the 2004 Christmas holiday season," that "the MLK Gospel Choir was permitted in the past to perform traditional Christmas religious music at the Columbia High School Holiday Assembly but has now been banned from performing at this event," that "the high school brass ensemble has been banned from performing any traditional Christmas songs and carols . . . at these concerts," and that "it is permissible, from a constitutional perspective, for a school district to allow religious music, including Christmas music, in its public schools and at other school-sanctioned events." (Id. at 36-37; Pl.'s Opp. Br. at 34-35.) Moreover, according to Plaintiff, "the public perception and reaction to the policy and its implementation demonstrate that the challenged policy was '*sufficiently likely to be perceived*' by the community as a 'disapproval' of religion, irrespective of the School District's alleged purpose for adopting it." (Pl.'s Supporting Br. at 20.)

Defendants assert that "it is clear that the effect of the defendants' current policy is one that encourages and promotes complete religious neutrality, neither

favoring nor demonstrating hostility toward religion." (Defs.' Opp. Br. at 14.) According to Defendants, "[t]he narrow restrictions placed upon the performances by the MLK Gospel Choir and the high school brass ensembles are grounded in this policy of complete religious neutrality and are reasonable and limited in their scope." (Id.)

The Court agrees that before the interpretation of Policy 2270 in 2004, certain religious holiday music was performed at the December concerts, including by the Columbia High School Brass Ensemble, and the MLK Gospel Choir participated in the concerts. To be sure, wholesale changes to the programs of the December concerts alone and without more might send a message of disapproval to the reasonable observer. The Court also acknowledges the complaints by members of the community, and by the "district music teachers." Such complaints, if informed by "the totality of the circumstances," may assist the Court in its consideration of the perspective of the reasonable observer.[11] The Court, however, finds that there is ample evidence available to the objective observer regarding the interpretation of Policy 2270 in the totality of circumstances, which removes any claim that it conveys a message of disapproval of religion.

The text of Policy 2270 clearly indicates an effort to include religious material when appropriate, provided that it is presented objectively and that it fits within the curriculum. In its introductory section, Policy

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[11] These complainants, however, may not serve as proxies for the reasonable observer, as it is unclear of the extent of their knowledge of the totality of the circumstances.

2270 states that "[w]e are cognizant of the role of culture, including religion, in the development of our society and believe that objectively teaching about religion and its role in the social and historical development of civilization does not violate the religious neutrality of the public schools." (O'Neill Cert., Ex. A (No. 37-4) at SO0140.) With respect to curricular objectives, Policy 2270 "[p]ermits the inclusion of religious literature, music, drama, dance and visual arts in the curriculum provided that it achieves specific goals of the written curriculum in the various fields of study; that it is presented objectively; and that it neither inhibits nor advances any religious point of view." (Id.) In particular, Policy 2270 requires "[a]ccommodat[ion of] student-initiated expression in response to questions or assignments which reflect their beliefs or non-beliefs about religious themes" and "permit[s] religious symbols to teach about historical or cultural context." (Id.) When specifically dealing with religious holidays, Policy 2270 directs that "opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum." (Id., Ex. A at SO0141.) Moreover, Policy 2270 allows for the use of religious music, provided "it achieves specific goals of the music curriculum." (Id.)

There is no doubt that the text of Policy 2270 also places restrictions on religion. Religious symbols are not permitted "to promote or celebrate religious concepts, events or holidays." (Id., Ex. A at SO0140.) "Decorations with religious significance are not permitted." (Id., Ex. A at SO0141.) And, of importance to this matter, "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or

focus on religious holidays." (Id.) These restrictions, are tailored to ensure the objective presentation of religion and to confine religion to the educational curriculum. As a result, the objective observer, armed with knowledge of both Policy 2270's accommodations to religion and restrictions on religion, would not conclude that the text of Policy 2270 sends a message of disapproval of religion.[12]

The implementation of Policy 2270 reinforces this conclusion, particularly regarding the School District's treatment of religious music. Although the interpretation of Policy 2270 restricts the performance of holiday music during the December concerts, music teachers have indicated that they continue to teach those songs in the classroom, (see Pl.'s Mot. for Summ. J., Ex. I (No. 36-14) at 43:5-10; O'Neill Cert., Ex. L (No. 37-15) at 43:5-10), and Director of Fine Arts Santoro has confirmed the appropriateness of this practice, (O'Neill Cert., Ex. H (No. 37-11) at 32:8-13; O'Neill Cert., Ex. J (No. 37-13)).[13] The interpretation of Policy

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[12] In fact, it is most likely that the objective observer would conclude that the text of Policy 2270 sends a message of neutrality towards religion. Statements such as "[t]he use and/or display of religious symbols should provide an environment whereby students of all faiths, beliefs or non-beliefs can participate without betraying their own faith or beliefs" and "special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs," (O'Neill Cert., Ex. A (No. 37-4) at S00141), reveal a sensitivity towards ensuring that the School District maintains complete neutrality in matters of religion.

[13] The Court recognizes that the implementation of Policy 2270 could indirectly influence curricular decisions made by the School District's music staff because the programs performed during the

2270 also has not affected the performance of songs with religious content such as Concerto VIII Fatto per la notte de natale, Wade in the Water, Waters of Babylon, Agnus Dei/Cum Sanctis, Laudamus Te, Jubilate, Ich will dem Hern, and Cum Sancto Spiritu. (Defs.' Supporting Br. at 9; see O'Neill Cert., Exs. M (37-16) & N (37-17).) It simply restricts the performance of holiday music at the time of the religious holiday that the music honors. (Pl.'s Mot. for Summ. J., Ex. C (No. 36-6) at 77:6-12.) Given the continued performance of religious songs and the continued teaching of holiday music in the classroom, the objective observer would not determine that the implementation of Policy 2270, with respect to the School District's treatment of religious music, sends a message of disapproval of religion.

The content of the discussions leading to the interpretation of Policy 2270 further undermine any arguments that it conveys a message of disapproval of religion. At Superintendent Horoschak's annual performance review, the School Board raised concerns that "you really can't balance all religious groups in these representations in these types of performances." (O'Neill Cert., Ex. B (No. 37-5) at 113:9-11.) Assistant Superintendent Memoli stated that discussion at the October 14, 2004 meeting involved ensuring that the administration is "treating everyone on an equal basis," (Defs.' Reply Br., Ex. B (No. 45-4) at 53:7-10), and that "no child feels uncomfortable in celebrating a

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December concerts are typically an outgrowth of the curriculum. The Court, however, is unaware of any evidence indicating that the implementation of Policy 2270 has actually had an effect on the curriculum or, if it has, the magnitude of that effect.

holiday that wasn't their own," (id., Ex. B at 59:23-25). The evidence suggests that had the objective observer attended Superintendent Horoschak's annual performance review or the October 14, 2004 meeting, he would have likely concluded that the interpretation of Policy 2270 conveys neutrality towards religion, not disapproval of religion.

The interpretation of Policy 2270 expressly restricts the performance of holiday music, which changed earlier practices within the School District. This result, however, does not automatically convey a message of disapproval of religion because as the Supreme Court observed in County of Allegheny, "[a] secular state, it must be remembered, is not the same as an atheistic or antireligious state." 492 U.S. at 610. By emphasizing the objective presentation of religion within the confines of the curriculum, continuing to allow the performance of religious music that does not focus on a particular holiday and to teach all religious music, even holiday music, inside the classroom, and acting on concerns of maintaining the appearance of neutrality within the School District, Defendants do not convey a message of disapproval of religion through the interpretation of Policy 2270.

C. "Excessive Entanglement" Prong

"There is no exact science in gauging the entanglement of church and state." Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 766, 96 S. Ct. 2337, 2354 (1976). But, "[a]n entanglement must be "excessive' before it runs afoul of the Establishment Clause,' and this requires more than mere '[i]nteraction between church and state,' for some level of interaction has always been 'tolerated.'" Child

Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 534 (3d Cir. 2004) (quoting Agostini v. Felton, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997)). According to the Supreme Court, "the factors we use to assess whether an entanglement is 'excessive' are similar to the factors we use to examine 'effect.'" Agostini, 521 U.S. at 232.

According to Plaintiff, "school officials will be required to screen music to determine whether it is religious or secular in nature," and "[d]rawing such distinctions between secular and religious themes will necessarily cause an entanglement with religion." (Pl.'s Supporting Br. at 37-38; Pl.'s Opp. Br. at 35-36.) Plaintiff concludes that "rather than making distinctions based on criteria related to learning and education, the School District is making distinctions based purely on ***religious criteria*** . . . thereby creating an impermissible entanglement." (Pl.'s Opp. Br. at 37.)

Defendants argue that "[t]he entire objective of the School District's current Policy is to avoid government entanglement with religion" and to "avoid becoming entangled in disputes and disagreements over the celebration of religious holidays, by maintaining a policy of complete religious neutrality when it comes to school sponsored assemblies and activities." (Defs.' Supporting Br. at 19-20.) Defendants maintain that "while enforcement of Policy 2270 has required some minimal screening of music selections, there is no suggestion in the record that the District's current policy has resulted in excessive entanglement issues." (Defs.' Opp. Br. at 17.)

Policy 2270 states that "[m]usic programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays." (O'Neill Cert., Ex. A (No. 37-4) at SO0141.) The October 29, 2004 memorandum indicates that "[a]ll programs will be reviewed and approved" by Director of Fine Arts Santoro and instructs the School District music staff to "avoid any selection which is considered to represent any religious holiday." (Id., Ex. I (No. 37-12) at SO0143.) Clearly, this screening of musical selections required by the interpretation of Policy 2270 involves some entanglement with religion.

If the Court were to conclude that the interpretation of Policy 2270 fostered an excessive entanglement with religion, however, Defendants would find themselves in a "Catch-22" – an action taken specifically to avoid an Establishment Clause violation, in and of itself would cause an Establishment Clause violation. The Court is disinclined to prompt this predicament, particularly given that it would create the risk of an Establishment Clause violation every time that a governmental entity engaged in decisionmaking regarding a religious topic. The Establishment Clause "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," Lemon, 403 U.S. at 614, and governmental entities must feel free to navigate the hazy contours of the Establishment Clause in order to achieve the mandate of governmental neutrality.

Plaintiff characterizes the oversight that the interpretation of Policy 2270 requires as "[d]rawing . . . distinctions between secular and religious themes."

(Pl.'s Supporting Br. at 37-38; Pl.'s Opp. Br. at 36.) This type of oversight – this drawing of distinctions between secular and religious themes – strikes the Court as no different from the screening that school districts engage in every day to ensure neutrality in matters of religion. Indeed, a similar drawing of distinctions between secular and religious themes occurs within this School District with regard to the treatment of holidays in the classroom. (O'Neill Cert., Ex. A (No. 37-4) at SO0141 ("Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday.").)

What the interpretation of Policy 2270, and Policy 2270 as a whole, seek to achieve is the objective presentation of religion within the School District; what they seek to avoid is the overt endorsement of religion within the same. Although accomplishment of these goals necessitates some involvement or entanglement with religion, such entanglement is not excessive. To conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause.

* * *

The Court finds that the interpretation of Policy 2270 has a valid secular purpose, does not convey a message of disapproval of religion, and does not foster an excessive entanglement with religion. The Court grants Defendants' motion for summary judgment and denies Plaintiff's motion for summary judgment with respect to the Establishment Clause claim.

2. The First Amendment Claim

Plaintiff's second claim is that the interpretation of Policy 2270 violates his children's right to receive information and ideas, right to learn, and right to academic freedom. The parties' arguments with respect to the First Amendment claim amount to a disagreement about the proper precedent upon which the Court should rely. According to Plaintiff, Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 102 S. Ct. 2799 (1982), serves as the starting point for the Court's analysis. Defendants, however, refer to Hazlewood School District v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988), as the authority for the Court's consideration of the First Amendment claim.

When the Court addressed the First Amendment claim in its September 29, 2005 Opinion, it determined that Kuhlmeier was the appropriate precedent for this case. (Op. (No. 13) at 17.) Although the Third Circuit vacated the September 29, 2005 Order, its decision only specifically addressed the Court's conclusions with respect to the Establishment Clause claim and did not call into question the Court's holding regarding the First Amendment Claim. After reviewing the evidence presented for these motions for summary judgment, the Court sees no reason to deviate from its earlier conclusions regarding the First Amendment claim and holds that Kuhlmeier, not Pico, provides the framework for analysis of the First Amendment claim and that the interpretation of Policy 2270 does not violate Plaintiff's children's right to receive information and ideas, right to learn, and right to academic freedom.

A. Pico versus Kuhlmeier

Pico involves the constitutionality of a school board's decision to remove certain books from its school districts' libraries. 457 U.S. at 856-58. Kuhlmeier involves the constitutionality of a school principal's decision to delete two pages of student-written articles from a school newspaper. 484 U.S. at 262-64. When superficially comparing the two cases, Pico deals with the right to receive ideas, whereas Kuhlmeier deals with the right to express ideas. Because the First Amendment claim is based upon Plaintiff's children's right to receive information and ideas, right to learn, and right to academic freedom, as opposed to his children's right to perform holiday music, it appears that this case may align more closely with Pico. Pico, however, expressly limits its holding to its facts, whereas Kuhlmeier's holding reaches beyond the scope of its factual context.

At the outset of its plurality opinion, the Pico Court emphasizes "the limited nature of the substantive question presented by the case," 457 U.S. at 861-62, summarizing it in the following manner: "[D]oes the First Amendment impose any limitations upon the discretion of petitioners to remove library books," id. at 863? Pico then proceeds to discuss at great length "the special characteristics of the school library," id. at 868-69, and to reject arguments given "the unique role of the school library" and "the regime of voluntary inquiry that there holds sway" at the library, id. at 869. The Kuhlmeier Court, on the other hand, broadly describes the issue that it addresses as "whether the First Amendment requires a school affirmatively to promote particular student speech." 484 U.S. at 270-71. This issue, according to the Supreme Court,

"concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Id. at 271.

The Court concludes that the December concerts are more appropriately characterized as "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," than compared with the school library. Accordingly, regardless of how Plaintiff presents his underlying rights, Kuhlmeier governs the issues raised in this case.[14]

B. Analysis Under Kuhlmeier

To analyze the interpretation of Policy 2270 under Kuhlmeier, the Court must first address the threshold issue of whether the December concerts are public

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[14] Even if the Court were to conclude that Pico was the appropriate precedent for this matter, however, the Court finds that the case does not support Plaintiff's position. According to the plurality opinion, "[o]ur Constitution does not permit the official suppression of ideas," so "[i]f petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." Pico, 457 U.S. at 871. The Court has already concluded that the purpose underlying the interpretation of Policy 2270 was to prevent an overt endorsement of religion or an improper focus on religious holidays, not to show disapproval of religion. As such the interpretation of Policy 2270 was not intended to deny Plaintiff access to ideas with which Defendants disagreed and does not qualify as an official suppression of ideas.

fora. If the Court concludes that the December concerts are not public fora, the Court must then determine whether the interpretation of Policy 2270 is "reasonably related to legitimate pedagogical concerns."

i. Forum Analysis

According to the Kuhlmeier Court, "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations." Id. at 267 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47, 103 S. Ct. 948, 956 (1983)). On the other hand, "[i]f the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." Id.

The Court is not aware of any evidence indicating that "by policy or practice" the December concerts were open for "indiscriminate use by the general public." It appears that students were not free to come on stage to perform a musical number of their choice, as might be the case in a school-wide talent show. The School District's music staff carefully tailors the programs that the students perform, and Director of Fine Arts Santoro approves the programs ahead of time, a practice that he followed even before the interpretation of Policy 2270. The Court concludes that the December concerts are not public fora.

ii. Reasonable Relationship to Legitimate Pedagogical Concerns

When dealing with "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," "[e]ducators are entitled to exercise greater control over this . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." Id. at 271. Indeed, "[a] school must . . . retain the authority to refuse . . . to associate the school with any position other than neutrality on matters of political controversy." Id. at 272.

Because "[i]t is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' . . . as to require judicial intervention to protect students' constitutional rights," any restrictions "over the style and content of student speech in school-sponsored expressive activities," must be "reasonably related to legitimate pedagogical concerns." Id. at 273. According to the Third Circuit, "[a] wide variety of policy justifications may pass muster under this test." Brody Through Sugzdinis v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992). Specifically, "'reasonable' grounds for content based restrictions include the desire to avoid controversy . . . and an interest in maintaining the appearance of neutrality . . . provided that these are

not simply pretexts for viewpoint discrimination." Id. (internal citations omitted).

As discussed under the "purpose" prong of the Lemon test, Defendants have provided sufficient evidence to convince the Court that the interpretation of Policy 2270 was intended to prevent an overt endorsement of religion or an improper focus on religious holidays. Just as that purpose was not a sham, it was also not a pretext for viewpoint discrimination. The Court finds that the interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns.

* * *

Applying the standards articulated in Kuhlmeier to this case, the Court concludes that the December concerts are not public fora and that the interpretation of Policy 2270 is reasonably related to legitimate pedagogical concerns. The Court grants Defendants' motion for summary judgment with respect to the First Amendment claim.

CONCLUSION

For the stated reasons, Plaintiff Michael Stratechuk's motion for summary judgment is denied; Defendants Board of Education, South Orange Maplewood School District, Brian F. O'Leary, and Peter P. Horoschak's motion for summary judgment is granted.

August 28, 2008

s/William H. Walls
United States Senior District Judge

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-6189 (WHW)

[Filed August 28, 2008]

MICHAEL STRATECHUK, individually and on behalf of his minor children,	)
Plaintiff,	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as Board President, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, in his official capacity as Superintendent, South Orange-Maplewood School District,	)
Defendants.	)

ORDER

Walls, Senior District Judge

This matter having been opened to the Court by Plaintiff Michael Stratechuk, seeking summary judgment on the first claim of the Amended Complaint, and Defendants Board of Education, South Orange Maplewood School District, Brian F. O'Leary, and Peter P. Horoschak, seeking summary judgment on all claims of the Complaint; and the Court having considered the moving, opposition, and reply briefs and having heard oral argument; and for good cause shown:

It is on this 28th day of August, 2008,

ORDERED that Defendants' motion for summary judgment is **GRANTED**; and it is further **ORDERED** that Plaintiff's motion for summary judgment is **DENIED**.

s/William H. Walls
United States Senior District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 08-3826

[Filed December 30, 2009]

MICHAEL STRATECHUK, Individually and on behalf of his minor children, Appellant	)
v.	)
BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, In his official capacity as board president, Board of Education, South Orange-Maplewood School District; PETER P. HOROSHAK, In his official capacity as superintendent, South Orange-Maplewood School District	)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by Appellant Michael Stratechuk in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: December 30, 2009

MLR/cc:
Christopher A. Ferrara, Esq.
Robert J. Muise, Esq.
Michael F. O'Neill, Esq.
Robert B. Hoffman, Esq.

(2)

No. 09-1184

IN THE

Supreme Court of the United States

MICHAEL STRATECHUK,

Petitioner,

v.

BOARD OF EDUCATION, SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT; BRIAN F. O'LEARY, in his official capacity as board president for the School District; and PETER P. HOROSHAK, in his official Capacity as Superintendent for the School District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The Petitioner is Michael Stratechuk ("Petitioner").

The Respondents are Board of Education, South Orange-Maplewood School District ("School District" or "District"); Brian F. O'Leary, in his official capacity as board president for the School District; and Peter P. Horoshak, in his official capacity as Superintendent for the School District ("Respondents").

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OPINIONS BELOW

The Third Circuit Opinion App. 1a, is reported at 587 F.3d 597 (3rd Cir. 2009). The District Court Opinion, App. 31a, is reported at 577 F. Supp. 2d 731 (D.N.J. 2008).

INTRODUCTION

The Petition for a Writ of *Certiorari* repeatedly mischaracterizes the ban on celebratory religious music imposed under School Board Policy 2270 and misstates the constitutional issue before the lower courts. The central issue was not whether the performance of traditional Christmas music in the public schools of this nation is constitutionally prohibited. Rather, the question addressed was whether the School District possessed the discretion to ban the celebration of religious holidays in its school system, by prohibiting the performance of music that is clearly associated with the celebration of religious holidays — specifically, Christmas and Hanukkah. Both the District Court and the Third Circuit affirmed the right of the School District to determine what types of religious music could be permitted at school-sponsored concerts, finding that the District possessed wide latitude to regulate matters relating to the school curriculum.

The facts do not support Petitioner's claim that Policy 2270 is hostile toward religion. The Policy, as written and interpreted, is constitutionally neutral. The performing of celebratory religious music at school-sponsored events is prohibited because such performances: (1) are not necessary to achieve the

specific goals of the music curriculum; (2) could be perceived by an objective reasonable observer as an overt endorsement of religion or an improper focus on religious holidays; and (3) inevitably offends certain participants and/or audience members. The ban on religious music performances here is very narrow, far more modest than the sweeping prohibitions described by Petitioner. Policy 2270 permits the study of religious music as part of the curriculum; the performance of religious music (including celebratory religious music) in the classroom; and the performance of religious music at school-sponsored concerts, as long as the music pieces are reasonably related to the curriculum and are not directly associated with the celebration of religious holidays.

Petitioner, in essence, contends that his children have a constitutional right to celebrate Christmas at year-end concerts in the South Orange-Maplewood school system. Stratechuk argues that because there had been a longstanding tradition of singing Christmas songs at holiday concerts in the District, the practice is constitutionally protected and the school board may not change it. As the Third Circuit noted, no decision of this Court or any lower federal court has ever held that the First Amendment mandates that traditional Christmas music be performed in year-end concerts at public schools in this country. App. 18a.

STATEMENT OF THE CASE

A. Policy 2270

This case involves a challenge to the School District's policy on "Religion in the Schools" (Policy 2270), which provides that religious music can only be performed at school-sponsored assemblies and events if the music achieves specific goals of the music curriculum and does not celebrate religious holidays. The Policy further provides that music programs, prepared or presented by student groups as an outcome of the curriculum, shall not have a religious orientation or focus on religious holidays. Policy 2270, as adopted in 2001, read in pertinent part as follows:

> 1. Religious holidays are not to be celebrated in the schools, except in the form of the secular nature of that holiday. However, opportunities to learn about cultural and religious traditions should be provided within the framework of the curriculum. Information about religious and cultural holidays and traditions, focusing on how and when they are celebrated, their origins and histories may be part of this instruction.
>
> 2. In planning school activities related to the teaching about religious holidays or themes, special effort must be made to ensure the activity is not devotional and that pupils of all faiths and beliefs can join without feeling they are betraying their own faith or beliefs.

> 3. Decorations with religious significance are not permitted.
>
> 4. Religious music, like any other music, can only be used if it achieves specific goals of the music curriculum.
>
> a. Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.

In or about December 2003, a parent complained to school officials about her child having to practice Christmas music in preparation for an upcoming holiday concert. That complaint led to a review of the District's interpretation and enforcement of Policy 2270. The District subsequently determined that the performance of music celebrating religious holidays during curricular and co-curricular events, such as year-end holiday concerts, was not necessary to achieve specific goals of the music curriculum and could be perceived as an overt endorsement of religion and/or an improper focus on certain religious holidays. School officials subsequently took steps to remind the music department staff of the Policy and that it was to be interpreted and enforced as written. In October 2004, Supervisor of Fine Arts, Nicholas Santoro, issued a memo advising the staff, consistent with the express language of the Policy, that religious music associated with the celebration of religious holidays would no longer be permitted at school-sponsored concerts.

Notwithstanding Petitioner's claim to the contrary, there is no competent evidence in the record supporting the contention that "the challenged policy is detrimental to a comprehensive music program and undermines sound educational goals and principles." In support of his claim, Petitioner relies principally upon the music faculty's reaction to the reinterpretation of Policy 2270, and to statements attributed to music teachers Barbara Eames and Bill Cook. Petition at 3. As the Third Circuit noted, however, the change in the interpretation of Policy 2270 was misunderstood by members of the music faculty. App. 9a-10a. Addressing a claim by Mrs. Eames that the reinterpreted Policy affected her ability to teach music in the classroom, the Court noted that Ms. Eames acknowledged at her deposition that she had not removed any Christmas or Hanukkah songs from her classroom curriculum. App. 10a. The panel also noted that Mr. Cook had acknowledged at his deposition that Policy 2270 "'didn't prohibit all religious music' in performances, only 'music based on . . . or themes consistent with pieces commonly associated with a holiday at the time of the holiday.'" App. 9a.

Further, a November 23, 2004 letter, purportedly sent on behalf of all music teachers in the District, reflected a fundamental misunderstanding about the scope of the change in the interpretation of Policy 2270. The music teachers who approved the letter were operating under the incorrect assumption that "student vocal and instrumental groups may not perform *any* religious music at December concerts." Petition at 8 (emphasis added). Policy 2270, in fact, does not ban the performance of religious music, but is limited to

prohibiting celebratory religious music at school-sponsored concerts.[1]

---

1. The following is a partial list of religious music performed at concerts under the challenged policy:

- Vivaldi's "Gloria *in Excelsis Deo*" ("*Cum Sancto Spiritu*") (which translates to "Glory be to God on high" and "The Holy Ghost").
- "*Concerto VIII, Fatto per la notte de natale*": By Arcangelo Corelli, known as the "Christmas Concerto."
- "*Wade in the Water*": Originally a Negro spiritual and since popularized by others; described as relating to both the Old and New Testaments, the verses describing the Israelites' escape from Egypt as per Exodus: 14 and the chorus setting forth the text of John 5:4. *See* http://en.wikipedia. org/wiki/Wade_in_the_Water (accessed January 15, 2009).
- "*Waters of Babylon*": Actually "By the Waters of Babylon," music to the words of Psalm 137 ("By the waters of Babylon, there we sat and wept, when we remembered thee, O Zion."). *See http://cpdl.org/wiki/index.php/Psalm_*137 (accessed January 15, 2009).
- "*Agnus Dei/Cum Sanctis*": Both selections are parts of Mozart's famous "Requiem", literally translated as "Lamb Of God," a phrase originally referring to Jesus Christ, and "With the Saints."
- *Jubilate* (actually "Jubilate Deo"): By Michael Praetorius, a 16th century German composer. The text is from Psalm 100 and the title translates to "In the Lord Rejoicing." *See http://www.cpdl.org/wiki/index.php/ Psalm_100* (accessed January 15, 2009).

(Cont'd)

To summarize, religious music remains an integral part of the music curriculum and concerts in the South Orange-Maplewood school system. Not coincidentally, the controversy surrounding the misunderstood change in the District's Policy toward religious music has all but evaporated. Year-end concerts, replete with performances of sacred religious pieces (albeit non-celebratory), have gone on in the District for the last several years without apparent objection or controversy.[2]

B. The Decisions Below

The District Court granted Respondents' motion for summary judgment, finding that the challenged policy satisfied the three-pronged test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. 51a-68a. The District Court also rejected Stratechuk's alternative First Amendment claim, that "the interpretation of Policy 2270 violates his children's right to receive

(Cont'd)

- "*Ich will den Herrn Loben*": By Georg Philipp Telemann, translated as "I Want to Praise the Lord," the text in German of Psalm 34. *See* http://209.85.165.100/translate_c?hl=en&sl=de&u=http://www.labbe.de/liederbaum/index.asp%3Ft (accessed January 22, 2009).

2. In October 2005, well after plaintiff filed the original complaint, the School District amended Policy 2270 and adopted Regulation 2270, in order to clarify the District's current interpretation and enforcement of its policy regarding religion in the schools. These revisions, however, were not significant and did not result in a substantive change in the District's interpretation of Policy 2270.

information and ideas." App. 69a-74a. This alternative claim was not briefed as part of plaintiff's Petition and will not be discussed further.

In affirming, the Third Circuit agreed that the Policy was constitutional under the *Lemon* test. Addressing the "secular purpose" prong, the Third Circuit upheld the finding that the change in the School District's interpretation of Policy 2270 was motivated by a desire to avoid a potential Establishment Clause violation. Rejecting plaintiff's argument that the School District's stated secular purpose was a "sham," the Court noted that "the concerns that led to the October 2004 Memo were the very types of concerns underlying the Establishment Clause jurisprudence in this area, i.e., the need for government neutrality towards religious institutions and beliefs, *McCreary County*, 545 U.S. at 860, and the impressionability of young children, *Edwards*, 482 U.S. at 583-84." App. 19a. The panel added:

> The cases cited by Stratechuk all upheld the policy of the respective schools or school districts. That is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment. Stratechuk has offered no persuasive authority that the First Amendment prevents South Orange-Maplewood School District from formulating a policy that precludes performance of religious holiday music.

App. 18a. It further held that "'the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the 'Establishment Clause line' they wish to place themselves.'" App. 19a.

The Court rejected Stratechuk's argument that Policy 2270 amounted to unconstitutional disapproval of religion, describing it as "'based largely upon plaintiff's inaccurate factual contention that defendants' policy amounts to a ban on religious music in the school system.'" App. 19a (quoting Appellee's Brf. at 37). The Court observed that "it is clear that the policy, as interpreted, does not prevent — and the record shows that it has not in fact prevented — the teaching of religious holiday songs in the classroom or the performance of songs with religious content at the December concerts." App. 19a-20a.

Turning to the "effect" prong of the *Lemon* test, the Third Circuit found ample evidence supporting the District Court's finding that the revisions to Policy 2270 were neutral toward religion when viewed through the eyes of a true neutral observer. The District Court had noted that the revised policy permitted the inclusion of religious music as part of the curriculum when objectively presented and required "'[a]ccommodat[ion of] student-initiated expression[s] . . . which reflect their beliefs or non-beliefs about religious themes. . . . Moreover, Policy 2270 allows for the use of religious music, provided it achieves specific goals of the music curriculum.'" App. 21a.

The Third Circuit rejected Stratechuk's argument that student, faculty, parental and public opposition to the change in the Policy established that a reasonable observer would view the change as hostile toward religion. The Court correctly observed that the "constitutionality of a school board's policy toward religion cannot be decided by reference to popular opinion." App. 23a; *citing*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316-17 (2000).

The Third Circuit had no difficulty disposing of Stratechuk's argument that the revisions to Policy 2270 resulted in "excessive governmental entanglement" with religion — the third prong of the *Lemon* test. The Court saw little difference between the minimal oversight of music selections for year-end concerts and the decisions school districts must make each day in an effort to maintain neutrality toward religion. The Third Circuit recognized that "'[t]o conclude otherwise ignores the evidence and would undermine governmental efforts to comply with the Establishment Clause.'" App. 25a (quoting District Court decision, 577 F. Supp. 2d at 749).

At Stratechuk's urging, the Third Circuit also considered the constitutionality of the School District's change in its Policy under the "endorsement test," which some courts have interpreted as a modification to the *Lemon* test. The endorsement test, the Court noted, eliminates the entanglement prong and applies an "objective observer" analysis to the purpose and effect prong of the *Lemon* test. Citing its analysis of the "purpose" and "effect" analysis under the *Lemon* test, the Third Circuit easily concluded that the School District's policy "does not exhibit endorsement or hostility towards religion." App. 25a-26a.

REASONS FOR DENYING THE PETITION

POINT I

THE LIMITED DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT

Petitioner labors mightily to portray this case as one presenting issues of "exceptional public importance" that will "ensure the demise" of the "rich tradition[ ]" of celebrating Christmas, via religious music, in public schools" and "embolden those who use the Establishment Clause as a blunt instrument against religion to continue to do so." Petition at i-ii. The reality of this matter is quite different. The Court of Appeals opinion is far more modest in its impact and implications than Petitioner would have this Court believe. This case concerns a subset of the issue of the proper role of religion and, in particular, of religious music in public schools.[3] The subset is religious music that is explicitly related to and celebratory of a religious holiday rather than religion, or even religious music, generally. As noted earlier, religious music in quantity (and in exceptional quality) continues to be performed at school concerts and religion remains a part of the School District curriculum, both as to music and other subjects,

3. "[T]he relationship between religion and education" has been the source of "[m]ost of the [Establishment Clause] cases coming to this Court." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973). This Court has addressed the issue on many occasions, and most recently declined to do so in *Nurre v. Whitehead*, 580 F. 3d 1087 (9th Cir. 2009), *cert. denied* (2010).

where appropriate. All that has changed is that the School District's winter season concerts no longer contain holiday-oriented religious music as they had previously.

The issue presented and decided was not whether the Establishment Clause prohibited the performance of celebratory religious music but whether the School District had the discretion to reduce the religious content at concerts, i.e., to "determine how close to the 'Establishment Clause line' they wish[ed] to place themselves". App. 19a. Hewing to that limited issue and recognizing the School District's right to make such decisions, the Third Circuit's opinion is quite narrow in its scope and pronouncements. It contains no sweeping statement that the First Amendment required the School District to have taken the challenged actions, *i.e.*, that failure to do so would have been an Establishment Clause violation. Instead, the Court recognized the substantial difference between constitutional mandates and prohibitions on the one hand, and constitutionally permissible behavior on the other — the differences and considerable space between what government "may," "must," and "may not" do. App. 18a-19a.

The Court of Appeals recognized that "the Constitution does not require the School to promote religion to the constitutionally permitted maximum;" "its failure to do so does not make it anti-religious in any constitutionally significant way;" and school districts could "determine how close to the 'Establishment Clause line' they wish to place themselves." App. 19a. The Court's conclusion hearkened to this last point:

"Many decisions about how to best create an inclusive environment in public schools, such as those at issue here, are left to the sound discretion of the school authorities." App. 28a. *See, Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 689 (11th Cir. 1987) (courts must be cognizant of "the broad discretion given school boards in choosing the public school curriculum").

Finally, this case raises questions similar to those recently considered in *Nurre v. Whitehead*, 580 F. 3d 1087 (9th Cir. 2009), *cert. denied* (2010), but with salient differences that make the decision here far less constitutionally significant. In particular, the graduation ceremony in *Nurre*, via stipulation, constituted a "limited public forum" and the "question presented" focused on that fact.[4] In that setting, the petitioner argued in support of *certiorari*, that the State "must not discriminate against speech on the basis of viewpoint." *Good News Club v. Milford Central School*, 533 U. S. 98, 106 (2001). The argument in support of *certiorari* here is far less compelling than that unsuccessfully urged in *Nurre*. This is not an instance in which the school purported to allow students to express themselves, a circumstance that gives rise to students' free speech rights. A school concert, absent very unusual circumstances not presented here, does not offer students an "open mike." There was no

4. The question presented was:

> Does the censorship of a student-selected, instrumental-only performance of 'Ave Maria' within a limited public forum at a high school graduation ceremony violate the First Amendment's Free Speech Clause?

opportunity for students to choose the musical play list and, thus, no need for administrators to review and veto their choice. There was no public forum of any kind.

For these reasons, the Court of Appeals opinion presents no issues warranting review by this Court.

POINT II

THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS FROM THIS COURT OR OTHER CIRCUIT COURTS

Petitioner asserts that the Third Circuit's decision conflicts with the controlling principles in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578 (1987); and *Epperson v. Arkansas*, 393 U.S. 97 (1968). Petition at 11-12. It does not. It is difficult to ascertain anything in *Santa Fe* that supports Petitioner, let alone that is contrary to the decision here. Both *Epperson* and *Edwards* contain language typical of Establishment Clause jurisprudence – that a statute's principal or primary effect must be one that neither advances nor inhibits religion – but are otherwise entirely inapposite, holding that the Creationism Acts there at issue were facially invalid because they lacked a clear secular purpose. At issue in *Church of the Lukumi Babalu Aye*, was "the principle that government may not enact laws that suppress religious belief or practice." 508 U.S. at 520. That principle is inapposite here.

Nor does the Third Circuit decision conflict with the decisions of other circuit courts. The cases cited by Petitioner in support of this contention, *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir. 1980); and *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997), address an entirely different issue. Petitioner describes those cases as holding that "the performance of traditional Christmas music in the public schools is not prohibited by the Constitution." *See* Petition at 12. This case has never presented that issue and the Third Circuit did not decide it. *See* App. 3a. ("The issue before us is whether a School District, in order to maintain a policy of complete religious neutrality, may prohibit celebratory religious music at school-sponsored events."). The principle upheld in those cases, the Third Circuit correctly recognized, "is far different from holding that the First Amendment compels a school district to permit religious holiday music or risk running afoul of the First Amendment." App. 18a. Thus, the purported conflict arises only from a mischaracterization of this case and its holding.

Our federal courts have universally upheld the rights of local school districts to exercise their discretion in an effort to avoid becoming embroiled in Establishment Clause disputes. *See, e.g., DeNooyer v. Livonia Pub. Schs.*, 799 F. Supp. 744 (E.D. Mich. 1992), *aff'd sub nom DeNooyer v. Merinelli*, 1 F.3d 1240 (6th Cir. 1993) and 12 F.3d 211 (6th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994) (school district's desire to avoid Establishment Clause violation could be compelling reason to support content-based ban on religious speech); *Walz v. Egg Harbor Twp. Bd. Of Educ.*, 342 F.3d 271 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (public school district has wide discretion

in controlling school-sponsored expressive activities; "[d]etermining the appropriate boundaries of student expression is better handled by those charged with educating youth"); *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1965), *cert. denied*, 382 U.S. 957 (1965) ("[d]etermination of what is to go on in public schools is primarily for the school authorities;" school acted well within its powers in concluding that student prayer must take place outside of school hours and functions).

POINT III

POLICY 2270, AS WRITTEN AND ENFORCED, IS NEUTRAL TOWARD AND DOES NOT DISFAVOR RELIGION

The arguments set forth in Points II and III of plaintiff's Petition are based upon fundamental misstatements of the factual record. Plaintiff characterizes the decision below as a complete ban on the performance of religious music at year-end concerts in the South Orange-Maplewood school system. This portrayal of the School District's decision allows plaintiff to argue that "singl[ing] out religious music for disfavored treatment [merely] because it is religious" amounts to "unconstitutional hostility toward religion." Petition at 13. Plaintiff cites *Lynch v. Donnelly*, 465 U.S. 668 (1984) for the proposition that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any," implying that the asserted complete ban on the performance of religious music is unconstitutional. Petition at 13.

Plaintiff's "hostility" and "lack of accommodation" argument is undercut by the actual undisputed facts. They reveal a balanced discretionary decision by a school district which sought to accommodate the religious viewpoints of all students in its diverse school population, while attempting to avoid Establishment Clause problems. Far from excising religious music from the South Orange-Maplewood curriculum, the School District's actions reflect nothing more than a good faith effort to accommodate all viewpoints and this Court's First Amendment jurisprudence.

Despite Petitioner's claims to the contrary, the School District's decision to interpret Policy 2270 as written did not arise out of any anti-religious agenda or animus, but rather an effort to maintain religious neutrality. (School District action taken "in order to maintain a policy of complete religious neutrality"). App. 3a. It realized that the District's student body and the community it served had become far more diverse in recent years; that the concerts inevitable focus on Christmas songs offended some participants and parents; and that balancing the concert play list so as to please all was, at best, a difficult task. These concerns, rather than violating the Establishment Clause, are of the "very type" that underlie Establishment Clause jurisprudence generally – the need for government neutrality toward religious institutions and beliefs and for respecting religious diversity. App. 14a; *citing*, *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005), and *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

The suggestion that the decision below will "pave the road for removing all religious references from

official recognition simply because they represent religion" is baseless hyperbole, particularly in view of the fact that religious music remains a central part of not only the music curriculum in the South Orange-Maplewood School District but also its year-end concerts. Petition at 15. Petitioner's assertions arise from the conflation of religious neutrality with religious animosity. Stratechuk views every action that reduces the role of religion in the public sphere as antireligious and therefore an Establishment Clause violation. There is in Petitioner's world view no position of neutrality toward religion, only supporters or opponents. This Court has rejected that approach, recognizing the difference between neutrality and hostility. *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). Indeed, neutrality towards religion is the paradigm under the Establishment Clause. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *Epperson v. Arkansas*, 393 U.S. 97 (1968). What Petitioner seeks is not neutrality but a rule requiring both that religion be promoted to the maximum extent possible and that the current role of religion be frozen in place, insulated from any diminution. But just as school districts can determine how close to the "Establishment Clause line" they wish to place themselves, they are free to change, in either direction, the spot they have previously chosen.

Petitioner essentially argues that true neutrality towards religion requires this Court to declare that the First Amendment mandates that traditional Christmas carols be performed at year-end concerts in South Orange-Maplewood, simply because that had been the tradition in the School District for many years. He

contends that, because in decades past school concerts included celebrations of Christmas, the Constitution *mandates* that Christmas be celebrated in the South Orange-Maplewood school district each year. Stratechuk has not cited to a single decision in support of his claim that the First Amendment mandates that Christmas be celebrated in the public schools of this country. Of course, no federal court has gone so far as to suggest that our First Amendment jurisprudence could support such a result.

POINT IV

THIS CASE, REPRESENTING AS IT DOES A MODEL OF RELIGIOUS NEUTRALITY AND BALANCING OF FIRST AMENDMENT CONCERNS, IS NOT AN APPROPRIATE VEHICLE FOR CLARIFYING THIS COURT'S FIRST AMENDMENT JURISPRUDENCE

In Point IV, Petitioner argues that this case presents the Court with the opportunity to clarify its jurisprudence by reviewing, for the first time, a case involving disfavor of religion. Petition at 23. As heretofore noted, the factual predicate for this argument is missing. As a matter of undisputed fact and law, the decisions below cannot be read as hostile to or disfavoring religion. Instead, the District Court and the Third Circuit decisions reflect appropriate judicial deference to a school district's broad discretionary right to decide matters affecting the school curriculum. They further respect a school district's discretionary right to attempt to avoid Establishment Clause problems by adopting a "truly" neutral policy toward religion in the schools. Policy 2270 permits the study of religious music as part of the curriculum, permits the performance of

religious music (including celebratory religious music in the classroom) and permits the performance of religious music at school-sponsored concerts, as long as the music pieces are reasonably related to the curriculum and are not directly associated with the celebration of religious holidays.

Petitioner's argument ignores the simple fact that Policy 2270, as currently interpreted, is constitutionally neutral because it bans celebratory religious music which could be perceived, by the reasonable objective observer, as governmental endorsement of religion and of Christianity in particular. The only religious music that is banned are those pieces that are directly associated with the celebration of religious holidays.

Since the factual predicate of plaintiff's argument in favor of *certiorari* is not supported in the record, this Court need not and should not entertain this case as a vehicle for revisiting its First Amendment jurisprudence interpreting the Establishment Clause.

CONCLUSION

Under the *Lemon* test, the coercion test, or any other recognized test for evaluating Establishment Clause claims, it is inconceivable that this Court would rule that the First Amendment *requires* that Christmas, Hanukkah or any other religious holiday be celebrated in the public schools of this country. For this reason, among the others cited, this Court should deny the Petition for *Certiorari*.

Respectfully submitted,

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